Supreme Court, U.S.
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No. 08-649

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In The

Supreme Court of the United States

CHARLES E. BAKER,

Petitioner,

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

49 C.F.R. § 214.7, which is part of the Roadway Worker Protection Rule, defines a "roadway worker" as an employee whose duties include construction or maintenance of roadway "on or near track or with the potential of fouling a track," and "fouling a track" as "the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train."

The questions presented by this case are:

1. Under 49 C.F.R. § 214.7, is an employee whose vehicle is struck by a train while he is engaged in construction or maintenance of the roadway a "roadway worker" in the "foul" of the track, if the employee's "work site" is not "on or near track"?

2. Under the Roadway Worker Protection Rule (49 C.F.R. § 214), is a "work site" located twenty to thirty feet from the closest rail "near track"?

LIST OF PARTIES

Charles E. Baker, Petitioner

Canadian National/Illinois Central Railroad, Respondent

TABLE OF CONTENTS

Page

Questions Presented i

List of Parties ii

Table of Contents iii

Table of Authorities vi

Official and Unofficial Reports of the Opinions and Orders Entered in the Case 1

Basis for Jurisdiction in This Court 1

Regulations Involved in the Case 1

Statement of the Case 4

Argument 9

Conclusion 18

Appendix

Order, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 06-60138 (5th Cir. 2008) ..... App. 1

Judgment, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 06-60138 (5th Cir. 2008) ..... App. 25

Memorandum Opinion & Order, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 3:03CV905LN (S.D. Miss. 2005) ..... App. 27

TABLE OF CONTENTS – Continued

Page

Trial Transcript Excerpts Pertaining to Findings of Fact and Conclusions of Law, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 3:03CV905LN (S.D. Miss. 2005) ..... App. 68

Special Verdict, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 3:03CV905LN (S.D. Miss. 2005) ..... App. 80

Final Judgment on Jury Verdict, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 3:03CV905LN (S.D. Miss. 2005) ..... App. 86

Order Denying Plaintiff's Motion for Judgment as a Matter of Law on Certain Issues and for New Trial on Remaining Issues or, In the Alternative, for New Trial on All Issues, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 3:03CV905LN (S.D. Miss. 2006) ..... App. 89

Order Denying Petition for Rehearing, *Baker v. Canadian Nat'l/Illinois Cent.*, No. 06-60138 (5th Cir. 2008) ..... App. 90

Regulations ..... App. 91

Federal Railroad Administration, *Roadway Worker Protection, Final Rule*, Federal Register, Vol. 61, No. 242, December 16, 1996, 65959 ..... App. 102

Federal Railroad Administration, *Technical Bulletin No. G-05-21*, January 10, 2005, *at* http://www.fra.dot.gov/us/content/1532 ..... App. 107

TABLE OF CONTENTS – Continued

Page

Canadian National, *On Track Safety*, *at* http://www.contractororientation.com/main/cn/canadianrailfullcourse.htm ..... App. 109

CSX Transportation, *Property Corridor Safety*, *at* http://www.csx.com/?fuseaction=about.property_corridor_safety ..... App. 111

TABLE OF AUTHORITIES

Page

CASES

Assoc. of Am. R.R. v. Dep't of Transp., 198 F.3d 944 (D.C. Cir. 1999) 10

Auer v. Robbins, 519 U.S. 452 (1997) 15

Baker v. Canadian Nat'l/Illinois Cent., 536 F.3d 357 (5th Cir. 2008) 1

Baker v. Canadian Nat'l/Illinois Central, 397 F.Supp.2d 803 (S.D. Miss. 2005) 1

Bob Jones Univ. v. United States, 461 U.S. 574 (1983) 17

Duncan v. Walker, 533 U.S. 167 (2001) 14

Illinois Cent. R.R. Co. v. White, 610 So.2d 308 (Miss. 1992) 16

Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147 (1883) 14

Lockhart v. United States, 546 U.S. 142 (2005) 12

S.D. Warren Co. v. Maine Bd. of Envtl. Prot., 547 U.S. 370 (2006) 16

Thomas Jefferson Univ. v. Shalala, 512 U.S. 504 (1994) 15

United States v. Menasche, 348 U.S. 528 (1955) 14

Williams v. Taylor, 529 U.S. 362 (2000) 14

TABLE OF AUTHORITIES – Continued

Page

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 6

49 U.S.C. § 20142 10

REGULATIONS

49 C.F.R. § 214.301 ..... 3, 4, 10, 15, 17

49 C.F.R. § 214.303(a) 1

49 C.F.R. § 214.335 3

49 C.F.R. § 214.7 ..... *passim*

49 C.F.R. § 311(a) 16

OTHER AUTHORITIES

Federal Railroad Administration, *Notice of Safety Advisory*, Federal Register, Vol. 69, May 3, 2004, 24220 ..... 10, 11

Federal Railroad Administration, *Roadway Worker Protection, Final Rule*, Federal Register, Vol. 61, No. 242, December 16, 1996, 65959 ..... 14, 15

Federal Railroad Administratoin, *Railroad Workplace Safety: Adjacent-Track On-Track Safety for Roadway Workers, Notice of Proposed Rulemaking*, Federal Register, Vol. 73, July 17, 2008, 41214 11

TABLE OF AUTHORITIES – Continued

Page

Federal Railroad Administration, *Roadway Worker Protection, at* http://www.fra.dot.gov/downloads/safety/safety_brochure2008_final.pdf 11, 12

Federal Railroad Administration, *Technical Bulletin No. G-05-21*, January 10, 2005, *at* http://www.fra.dot.gov/us/content/1532 14

Merriam-Webster Online Dictionary, *at* http://www.merriam-webster.com/dictionary 17

OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

Baker v. Canadian Nat'l/Illinois Cent., 536 F.3d 357 (5th Cir. 2008)

Baker v. Canadian Nat'l/Illinois Cent., 397 F.Supp.2d 803 (S.D. Miss. 2005)

BASIS FOR JURISDICTION IN THIS COURT

The United States Court of Appeals for the Fifth Circuit entered judgment against Petitioner on July 16, 2008. App. 25. The Fifth Circuit denied Petitioner's request for rehearing on August 15, 2008. App. 90. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

REGULATIONS INVOLVED IN THE CASE

> The purpose of this subpart is to prevent accidents and casualties caused by moving railroad cars, locomotives or roadway maintenance machines striking roadway workers or roadway maintenance machines.

49 C.F.R. § 214.301(a)

> This subpart prescribes safety standards related to the movement of roadway maintenance machines where such movements affect the safety of roadway workers. This

> subpart does not otherwise affect movements of roadway maintenance machines that are conducted under the authority of a train dispatcher, a control operator, or the operating rules of the railroad.

49 C.F.R. § 214.301(c)

> Each railroad to which this part applies shall adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad. Each such program shall provide for the levels of protection specified in this subpart.

49 C.F.R. § 214.303(a)

> No employer subject to the provisions of this part shall require or permit a roadway worker who is a member of a roadway work group to foul a track unless on-track safety is provided by either working limits, train approach warning, or definite train location in accordance with the applicable provisions of Secs. 214.319, 214.321, 213.323, 214.325, 214.327, 214.329 and 214.331 of this part.

49 C.F.R. § 214.335(a)

> Roadway work groups engaged in large-scale maintenance or construction shall be provided with train approach warning in accordance with Sec. 214.327 for movements on adjacent tracks that are not included within working limits.

49 C.F.R. § 214.335(c)

> Adjacent tracks mean two or more tracks with track centers spaced less than 25 feet apart.

49 C.F.R. § 214.7

> Fouling a track means the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

49 C.F.R. § 214.7

> On-track roadway maintenance machine means a self-propelled, rail-mounted, non-highway, maintenance machine whose light weight is in excess of 7,500 pounds, and whose purpose is not for the inspection of railroad track.

49 C.F.R. § 214.7

> On-track safety means a state of freedom from the danger of being struck by a moving railroad train or other railroad equipment, provided by operating and safety rules that govern track occupancy by personnel, trains and on-track equipment.

49 C.F.R. § 214.7

> Roadway maintenance machine means a device powered by any means of energy other than hand power which is being used on or

> near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary.

49 C.F.R. § 214.7

> Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track.

49 C.F.R. § 214.7

> Roadway work group means two or more roadway workers organized to work together on a common task.

49 C.F.R. § 214.7

STATEMENT OF THE CASE

Respondent ("Illinois Central") contracted with W.S. Red Hancock, Inc. ("Hancock") to have a Hancock work crew remove vegetation, dirt, and similar obstructions from its right of way at a public railroad crossing maintained by Illinois Central. Tr. 90-93.

Petitioner ("Baker") was employed by Hancock as a dump truck driver. *Id.* The purpose of this work was to improve visibility for the motoring public as it proceeded across this crossing. Tr. 93. The work required Baker and Ken Henderson, another Hancock driver, to haul the cleared debris across the crossing to a nearby landfill. Tr. 92-94, 192, 489-92, 518. Once one driver's truck was loaded and departed, the crew would load the other one so it could proceed across the crossing to dump more material. Tr. 192. The work site was twenty to thirty feet from the closest rail. Tr. 185. Baker was injured when his truck was struck by an Illinois Central train as he proceeded across the crossing with a load of debris. Tr. 97, 107-09. The last wheels of Baker's trailer were still on or had barely cleared the work site. Def. Trial Ex. 8. Some but not all of the sight obstructions had been removed. Tr. 203-04. The witnesses agreed that no flagmen or watchmen were present to warn the Hancock employees of oncoming trains, or to warn any approaching trains that work was taking place near the crossing. Tr. 201, 545.

Illinois Central's Roadway Worker Protection Rule states that movement over crossings can only occur where protection is provided by a watchman, or where the employee in charge has received foul time or track and time from the control operator. Doc. 69, Ex. 12 at 8-10. Canadian National acquired Illinois Central on July 1, 1999. Doc. 140, Ex. 1. Canadian National requires roadway worker protections whenever work will occur within 25 feet of the rail. Doc.

128, Ex. 4 at 4. Edward Stanton, a liability expert, noted Illinois Central's actions did not comply with the current rules used by Class I railroads. Tr. 412. *See also, e.g.*, Doc. 128, Ex. 3 at 1 ("All work beyond 4 feet from the outside rails and within 25 feet, must be done under the supervision of a qualified inspector or CSXT flagman."); Doc. 76, Ex. 17 at 4-5 (identifying Burlington Northern & Santa Fe Railroad requirements for roadway worker protection whenever work activities will occur within twenty-five feet of the center of the track).

Defendant removed the case to federal court on the basis of diversity jurisdiction, 28 U.S.C. § 1332. Defendant claimed it was an Illinois corporation, while Baker was a citizen of Mississippi. Doc. 1.

Both parties moved for partial summary judgment on the issue of whether Illinois Central violated the Roadway Worker Protection Rule (RWPR). App. 27, 29. The district court denied the motions. App. 30. It noted the RWPR include employees of contractors whose duties include construction or maintenance of the roadway "on or near track or with the potential of fouling a track," and that "fouling a track" occurs whenever "the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail." App. 30-31, citing 49 C.F.R. § 214.7. It recognized that Baker was an employee of a contractor assisting with construction or maintenance of the "right-of-way" at the time of the accident. App. 28, 32. It agreed with Baker that the term

"roadway" in the RWPR is synonymous with "right-of-way." App. 32-33. It also recognized that a person working more than four feet from the track would be a "roadway worker" if their potential maintenance or construction activities could cause movement into the space that would be occupied by a train. App. 34 & n.4. However, it held that applying the RWPR to Baker's movement across a public grade crossing would create an "unbearable, and obviously unintended burden," because it would necessitate the extension of RWPR protections "to workers working far away from their tracks when those workers, in the course of their workday, have to drive across a public grade crossing." App. 35. It held that whether the RWPR did or did not apply required a fact-based inquiry:

> In the court's opinion, if the location and configuration of the worksite in relation to Greens Road and the subject crossing was such as to prevent Baker from being able to pull fully onto the road and approach the crossing at the same 90 degree angle as any other driver and instead was such as to require that he approach the crossing at a 45 degree angle which would have obscured his view of the tracks to the south, then the RWPR would arguably apply. Practically, to put a worker in this position is little different from requiring a worker to traverse the tracks at a point where there is no recognized crossing. This puts him at greater risk than members of the motoring public and in

> the court's view, would entitle him to the protection of the RWPR.

App. 36-37 (footnote omitted).

At trial, the district court denied both parties' motions for judgment as a matter of law on this issue. Tr. 632-38. The instructions defined "fouling a track" as "the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail." Tr. 655. However, the district court instructed the jury that while the district court had determined Baker was a "roadway worker," the RWPR would not apply if the jury determined that Baker was able to approach the crossing like an ordinary motorist. Tr. 654-57. Baker's objection that there was no language in the RWPR supporting this portion of the instruction was overruled. Tr. 640-41, 645. The jury returned a special verdict, holding that Baker's work did not require him to "foul" the track as defined in the instructions. Doc. 125.

The Fifth Circuit, while recognizing that the RWPR "provides some additional coverage [for work taking place] beyond four feet" of the near running rail, held as a matter of law that Baker was not a "roadway worker," and that the RWPR did not apply. App. 7-8. It stated, "The evidence indicated that the job site was located, at it nearest point, twenty to thirty feet from the closest rail. At that distance,

Baker did not, as a matter of law, have the potential to foul the track, nor was he on or near the track." App. 8. It noted that while Baker obviously had fouled the tracks when he was hit by the train, "[t]hat fact is not dispositive, because Baker fouled the tracks and was hit away from the work site." *Id.* It stated, "[t]he proximity of the work site to the track determines whether the RWPR apply, not whether a worker fouls the tracks after leaving the work site." *Id.* The Fifth Circuit affirmed the district court's rulings without commenting on whether the fact-based "ordinary motorist" approach to the RWPR was valid. *See id.* ("We do not reach the question of whether Baker ceased to be a 'roadway worker' once he drove his truck onto the public road . . . "); *see also id.* at 11. However, it also suggested the jury's finding that Baker's work did not require him to "foul" the track was warranted because there was a dispute as to how Baker could have approached the crossing and whether his view of approaching trains was obstructed. App. 15-16.

ARGUMENT

The Fifth Circuit's decision involves important questions of federal law that have not been, but should be, settled by this Court. Because the Fifth Circuit has severely limited the scope of the Roadway Worker Protection Rule (RWPR), it has significantly increased the possibility that other persons doing construction or maintenance work for railroads or

their contractors will be injured or killed. The purpose of the RWPR is "to prevent accidents and casualties caused by moving railroad cars, locomotives or roadway maintenance machines striking roadway workers or roadway maintenance machines." 49 C.F.R. § 214.301(a). Congress recognized the need for such rules when it passed the Rail Safety Enforcement and Review Act of 1992, which directed the Secretary of Transportation to review and revise federal rules relating to railroad track safety. *Assoc. of Am. R.R. v. Dep't of Transp.*, 198 F.3d 944, 946 (D.C. Cir. 1999), citing 49 U.S.C. § 20142. In response to that directive, the Federal Railroad Administration (FRA) conducted a study and found that from 1989 to 1993 twenty-two railroad workers were struck and killed by trains or on-track equipment. 198 F.3d at 946. "Based on these findings and the result of a similar study by a joint labor-management task force, the FRA established a federal advisory committee comprised of representatives from management, labor, and the agency to engage in a negotiated rulemaking on the subject of roadway worker safety." *Id.* "The advisory committee eventually produced the Roadway Worker Protection Rule, which, following notice and comment, became effective in January 1997." *Id.*

The RWPR "has proven to be an effective tool for reducing roadway worker fatalities." *Notice of Safety Advisory*, Federal Register, Vol. 69, May 3, 2004, 24220, 24221. After the regulation became effective in 1997, roadway worker fatalities declined significantly.

Id. Unfortunately, the effectiveness of these rules has diminished. In 2003, there were five roadway worker fatalities, compared with one in 1999. *Id.* "From 1997 to [May 3, 2004], 20 fatalities have been attributed to non-compliance with the regulation." *Id.* "Ten of the 20 fatalities occurred when workers entered fouling space and were struck by a train or on-track equipment." *Id.* Notably, Baker's injuries occurred when he "entered fouling space" and was "struck by a train." Under the Fifth Circuit's decision, railroads would not be required to take any action to prevent injuries or fatalities that could arise where workers, as part of the construction or maintenance activities, had to leave the work site and expose themselves to being struck by trains. The FRA, in light of the fatalities and injuries roadway workers continue to suffer, recognizes that "***more*** needs to be done to protect roadway workers," and that "***additional*** attention and emphasis needs to be placed on worker protection." *Id.* (emphasis added). "FRA believes that increased awareness by railroads, contractors to railroads, and their employees of certain dangers and how to avoid or minimize them ***may save lives***." *Id.* (emphasis added). The FRA recognizes these regulations need to be strengthened, not weakened, in order "to reduce further the risk of serious injury or death to roadway workers." Federal Railroad Administration, *Railroad Workplace Safety: Adjacent-Track On-Track Safety for Roadway Workers, Notice of Proposed Rulemaking*, Federal Register, Vol. 73, July 17, 2008, 41214, 41214. As of 2008, there had been thirty-four roadway worker fatalities since the RWPR was implemented.

Federal Railroad Administration, *Roadway Worker Protection*, *at* http://www.fra.dot.gov/downloads/safety/safety_brochure2008_final.pdf. Twelve fatalities occurred between mid-2006 and March 13, 2008. *Id.* The FRA recognizes "for every one fatality there may be 100 reportable injuries, another 10,000 near misses, or 100,000 unsafe acts." *Id.*

Unfortunately, the Fifth Circuit's decision significantly reduces the protections offered to roadway workers under the plain language of the RWPR. 49 C.F.R. § 214.7's definition of a "roadway worker" includes an employee of a contractor whose duties include construction or maintenance of roadway "on or near track ***or*** with the potential of fouling a track." *Id.* (emphasis added). An individual is "fouling a track" whenever they or their equipment are "in such proximity to a track that the individual or equipment could be struck by a moving train." 49 C.F.R. § 214.7. The witnesses agreed that Baker was on duty and assisting with construction and maintenance activities at the time of the collision, and Baker was struck by a train. There is no language in the RWPR limiting the definition of "fouling a track" to circumstances in which the individual is still on the work site, nor is there any language stating there is a "public grade crossing" exception. 49 C.F.R. § 214.7. These facts alone should have ended the inquiry. *See Lockhart v. United States*, 546 U.S. 142, 146 (2005) ("The fact that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.").

The FRA cannot protect roadway workers if courts will not abide by the plain language of its regulations or its interpretations of these regulations.

The use of the disjunctive "***or***" within the definition of "roadway worker" indicates there are two ways a person such as Baker can be a "roadway worker": (1) he can be performing work at a work site that **was** "on or near track" or (2) he can be performing work at a work site that **was not** "on or near track," if that work has "the potential of fouling a track." 49 C.F.R. § 214.7. The Fifth Circuit's holdings that Baker was not fouling the track because he was not on the work site when his truck was hit by Defendant's train and that "[t]he proximity of the work site to the track determines whether the RWPR apply, not whether a worker fouls the track after leaving the work site" allow railroads to avoid compliance with the RWPR unless the "work site" on which their employees or their contractor's employees are performing work is "on or near track." Under the Fifth Circuit's approach, railroads will no longer have to provide any protections to employees who are performing work that has the "potential of fouling a track," meaning the potential that they could get struck and killed by trains, so long as they have the foresight to put the "work site" twenty feet or more from the near running rails of the tracks. The Fifth Circuit's holdings give meaning to the phrase "on or near track," but render the phrase "potential of fouling a track" inoperative and superfluous. As such, this decision eliminates protections required by the plain language of the

RWPR, and is in error. *See Williams v. Taylor*, 529 U.S. 362, 404 (2000) ("It is, however, a cardinal principle of statutory construction that we must 'give effect, if possible, to every clause and word of a statute.'") (citing and quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955), *Inhabitants of Montclair Tp. v. Ramsdell*, 107 U.S. 147, 152 (1883)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("Further, were we to adopt respondent's construction of the statute, we would render the word 'State' insignificant, if not wholly superfluous. 'It is our duty "to give effect, if possible, to every clause and word of a statute."'") (citations omitted).

The Fifth Circuit's decision, in addition to being in derogation of the plain language of the rules, also undermines the RWPR because it is in conflict with the FRA's interpretation of its regulations. Both the Fifth Circuit and the district court suggested that while Baker might have been a "roadway worker" while he was on the work site, he lost that status once he left the work site. The FRA, in promulgating the rule, explicitly stated "the term roadway worker was intended to describe employees who are covered and not to describe when this coverage begins and ends." Federal Railroad Administration, *Roadway Worker Protection, Final Rule*, Federal Register, Vol. 61, No. 242, December 16, 1996, 65959, 65962 (Final Rule), Federal Railroad Administration, *Technical Bulletin No. G-05-21*, January 10, 2005, *at* http://www.fra.dot.gov/us/content/1532. The FRA was concerned that the approach suggested by the Fifth

Circuit and the district court "would severely limit application of the rule due to the difficulty in determining when a worker becomes engaged in a task." Final Rule at 65962. The FRA has clearly stated the RWPR apply, notwithstanding the location of the work site, if the worker's activities can cause him or her to be hit by a train. *See* Final Rule at 65969 ("[a] person could be outside that distance and still be fouling the track under this rule if the person's expected or potential activities or surroundings could cause movement into the space that would be occupied by a train."). The FRA's interpretation of the regulations it has written, which is consistent with their plain language, is controlling. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("we must defer to the Secretary's interpretation unless an 'alternative reading is compelled by the regulation's plain language or by other indications of the Secretary's intent at the time of the regulation's promulgation."); *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (same).

The Fifth Circuit's "work site" approach also ignores other pertinent provisions of the regulations. The rules state they are designed to protect roadway workers and roadway maintenance machines from being struck by trains. 49 C.F.R. § 214.301(a). A "roadway maintenance machine" can be a vehicle that only has "road" wheels. 49 C.F.R. § 214.7. Under the approach of the Fifth Circuit and the district court, the RWPR protections would not extend to any workers using vehicles that only have "road" wheels,

because workers are not protected once they are on the road and away from the "work site."

Finally, the RWPR requires railroads to enforce their own roadway workers rules. 49 C.F.R. § 311(a). Canadian National acquired Illinois Central in 1999, and it requires roadway worker protections whenever work is taking place within twenty-five feet of the rails. *See supra*. Because Illinois Central did not ensure that its employees followed its own rules, it violated the RWPR as a matter of law. Notably, Illinois Central, in attempting to prevail in previous litigation, stated long before the RWPR were enacted that whenever it knows heavy equipment will be moving across its tracks, it will notify its train crews to be prepared to stop, and will sometimes post flag men to protect the crossing. *Illinois Cent. R.R. Co. v. White*, 610 So.2d 308, 313 (Miss. 1992).

The Fifth Circuit's holding that work taking place within twenty feet of the rails is not "near track" also severely limits the scope of the RWPR beyond any reasonable interpretation, again to the detriment of the nation's roadway workers. The RWPR do not define "on or near track." However, the RWPR define "adjacent tracks" as "two or more tracks with track centers spaced less than 25 feet apart." 49 C.F.R. § 214.7. Under the Fifth Circuit's logic, a distance defined in the RWPR as "adjacent" is not "near." Where a term such as "near" is not defined in a regulation nor a term of art, it must be construed "in accordance with its ordinary or natural meaning." *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 547 U.S.

370, 376 (2006). Any holding that a distance of twenty-five feet or less would be "adjacent" under the RWPR but not "near" would not be in accordance with the ordinary or natural meaning of these terms. Webster's defines the adjective "near" as "not far distant in time, place, or degree." Merriam-Webster Online Dictionary, *at* http://www.merriam-webster.com/dictionary, definition 1(a). The adjective "adjacent" is defined as "not distant; ***NEARBY***." *Id.*, definition 1(a) (emphasis added). In short, because the work site was close enough to the tracks to fit the RWPR definition of "adjacent," such distance must also be held to be "near track."

Finally, if the determination of what is "on or near track" is viewed as an open-ended question, the interpretation that best advances the purpose of the RWPR should be adopted. *See Bob Jones Univ. v. United States,* 461 U.S. 574, 585 (1983) ("And it is well settled that, in interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute . . . and the objects and policy of the law. . . ."). An interpretation that twenty to thirty feet is "near track" would result in more protection being provided to persons working on railroad right-of-ways, advancing the purpose set forth in 49 C.F.R. § 214.301(a); the Fifth Circuit's decision will result in less. Moreover, such an interpretation would be consistent with industry practice, as at least three Class I railroads, including Canadian National, provide such roadway worker

protections for work occurring within twenty-five feet of the rail.

CONCLUSION

The Fifth Circuit's decision is in derogation of the plain language of the regulations, the agency's interpretation of them, and their purpose. These regulations were created because it was recognized by Congress and the FRA that the problem of persons working on railroad right-of-way being struck by trains or other railroad vehicles was an issue of national importance. Because the Fifth Circuit's decision severely reduces the protections offered by these regulations, the questions of federal law presented should be settled by this Court.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60138

CHARLES E. BAKER,

Plaintiff-Appellant,

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:03-CV-905

(Filed Jul. 16, 2008)

Before HIGGINBOTHAM, SMITH and OWEN, Circuit Judges.

PRISCILLA R. OWEN, Circuit Judge:

Charles Baker sued "Canadian National/Illinois Central Railroad" for injuries sustained after its train struck the dump truck Baker was driving. The railroad, whose correct name is Illinois Central Railroad Company and to which we will refer as Illinois Central, prevailed in a trial before a jury. Baker appeals and alleges numerous errors. We affirm.

I

Illinois Central hired a contractor, W.S. Red Hancock, Inc. (Hancock), to remove vegetation, dirt, and other obstructions from the railroad's right of way at a public railroad crossing that Illinois Central maintained. Charles Baker worked for Hancock as a dump-truck driver. Together with Ken Henderson, another Hancock driver, Baker was to haul the cleared debris from the job site to a local landfill.

The job site was located approximately twenty to thirty feet from the closest rail, though the parties disputed the site's exact proximity to the tracks. There were stop signs and railroad crossbucks where the public road on which Baker traveled in leaving the job site intersected the tracks, but neither Illinois Central nor Hancock provided flagmen or watchmen to warn the work crew of approaching trains. Some of Baker's co-workers, including the other truck driver Henderson, testified they believed flagmen were unnecessary for this job site, though one did recall an unnamed co-worker's unsuccessful request for a flagman. Baker's expert, Edward Stanton, whose companies performed similar work, testified he believed a flagman was necessary and that companies generally used flagmen at sites he considered far safer than Green's Crossing, the site of the accident. James Loumiet, Baker's expert on railroad-highway safety, agreed with Stanton that a flagman was necessary for safety.

Shortly after 9:00 a.m., Baker followed Henderson across the tracks, and the Illinois Central's train struck Baker's truck. Baker testified that he did not see or hear the approaching train before the accident. Nonetheless, he concedes that Richard Dunn, the locomotive engineer, sounded the horn and bell in compliance with the law and was traveling within the maximum speed limit set by the Federal Railroad Administration (FRA).

Baker also testified that by the time he pulled off the job site and straightened his truck on the road, it was on the tracks, though he also claimed not to remember any events occurring after he released his parking brake. Baker's son, also an experienced truck driver but not an eyewitness, testified that in his opinion Baker would have been unable to pull his truck perpendicular to the crossing until the truck was on the tracks. Both agreed that Baker was unable to approach the tracks without some or all of his truck entering the road's left lane for oncoming traffic.

Nonetheless, several eyewitnesses disputed the Bakers' testimony. The locomotive engineer testified that Baker's truck was "squared up with the railroad tracks" and "all in his lane" moments before the accident. Baker's co-worker, Leon Davis, testified that, before Baker crossed the tracks, his truck was positioned such that he had the same view that any other motorist traversing the crossing would have had. The other driver, Henderson, testified he was able to straighten his own truck at the stop sign,

which provided him a ninety-degree angle to view the track like any other motorist. However, Baker's and Henderson's trucks were different makes and models.

Several eyewitnesses testified that Baker never stopped for the stop sign or warning devices, though they agreed his truck was traveling no faster than two miles per hour at the time of collision. Dunn, the locomotive engineer, testified that Baker never appeared to look for an approaching train. As Dunn approached, he observed Baker's co-workers running towards the truck and waving their arms, warning Baker of the approaching train.

Baker sued Illinois Central and alleged it was negligent for failing to provide flagmen or other protections to Baker and for not installing lights or gates. Baker filed a motion for partial summary judgment and argued that the Roadway Worker Protection Rules (RWPR) required Illinois Central to provide a flagman, watchman, or other protection because the work required the crew to "foul the tracks" by placing themselves in a position where a train could strike either them or their equipment and that Illinois Central did not dispute the absence of such warning systems. The district court denied Baker's motion and would later deny Baker's motion for a judgment as a matter of law.

The case proceeded to a jury trial with a verdict in favor of Illinois Central. The jury specifically found that Baker's work did not require him to "foul the tracks" as that term was defined in the district

judge's instructions. Baker appeals the outcome and alleges approximately sixteen errors and sub-errors.

II

Baker argues that the trial court erred in denying his motion for judgment as a matter of law in which he contended that the Illinois Central violated duties to provide a flagman under both the RWPR and common law and the breach of those duties was the proximate cause of the collision. The district court previously denied Baker's motion for partial summary judgment that asserted these same grounds. This court reviews de novo the denial of motions for judgment as a matter of law, applying the same standards the district court applied.[1] The district court should grant the motion if, after considering all evidence in the light most favorable to the party opposed to the motion, the facts and inferences strongly and overwhelmingly favor the moving party so that the court concludes reasonable jurors could not arrive at a contrary verdict,[2] or if there are no genuine issues of material fact and the movant is entitled to judgment as a matter of law.

We note at the outset that fact issues existed as to proximate cause under Mississippi law. The undisputed evidence indicated that Baker ran through the

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[1] *Bellows v. Amoco Oil Co.*, 118 F.3d 268, 273 (5th Cir. 1997).

[2] *Id.*

stop sign. Under Mississippi law, even if the railroad company were negligent, Baker's violation of three different statutory duties to stop[3] was arguably a proximate cause of the accident. Thus, the district court did not err as to proximate cause. For the same reasons, the district court did not err in rejecting Baker's contention that Illinois Central was negligent per se under Mississippi law.

A

Baker argues that the district court erred by denying the two motions regarding whether Illinois Central violated its duties under the RWPR. Illinois Central, however, disputes whether the RWPR apply.

The RWPR require that qualifying railroads adopt and implement an on-track safety program that will afford on-track safety to all roadway workers.[4] The regulations define "on-track safety" as "a state of freedom from the danger of being struck by a moving train or other railroad equipment, provided by operating and safety rules that govern track occupancy by

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[3] MISS. CODE ANN. § 77-9-249(1) (requiring a driver to stop at railroad tracks when locomotive emits signal within nine-hundred feet of crossing); MISS. CODE ANN. § 77-9-249(4) (requiring a driver to stop at crossbucks regardless of train's approach); MISS. CODE ANN. § 63-3-1009 (requiring a driver to stop at stop signs erected near railroad crossings).

[4] 49 C.F.R. § 214.303.

personnel, trains and on-track equipment."[5] The regulations further define "roadway worker" as:

> [A]ny employee of a railroad, or a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of *fouling a track,* and flagmen and watchmen/lookouts as defined in this section.[6]

Neither party disputes that Baker was an employee of a contractor to a railroad, but they do dispute whether the work that day was "on or near track or with the potential of fouling a track." "Fouling a track" is the "placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail."[7] Presumably, if "fouling a track" is placing an individual or equipment within four feet, at a minimum, of the track, then the phrase "on or near track" provides some additional coverage beyond four feet.

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[5] 49 C.F.R. § 214.7.

[6] *Id.* (emphasis added).

[7] *Id.*

The evidence indicated that the job site was located, at its nearest point, twenty to thirty feet from the closest rail. At that distance, Baker did not, as a matter of law, have the potential to foul the track, nor was he on or near the track. Nonetheless, Baker argues that he certainly fouled the track; the train actually hit him. That fact, however, is not dispositive, because Baker fouled the tracks and was hit away from the work site. The proximity of the work site to the track determines whether the RWPR apply, not whether a worker fouls the tracks after leaving the work site. Thus, the RWPR did not apply, and the court did not err by denying Baker's motions regarding Illinois Central's duty under the RWPR.

We do not reach the question of whether Baker ceased to be a "roadway worker" once he drove his truck onto the public road, an issue that the district court decided adversely to Baker.

B

Baker next argues the district court should have ruled that as a matter of law Illinois Central violated its common-law duties. Baker based his motions on his expert's testimony that whenever the expert's companies worked as independent contractors performing work similar to that of Hancock, the railroads provided flagmen or similar protections and that Illinois Central's failure to post a flagman was unreasonable. By analogy, Baker argues that in medical malpractice cases a jury cannot reject a

physician's testimony regarding the standard of care, even if lay witnesses testify that the defendant need not follow the standard. Baker also cites *Young v. Illinois Central Gulf Railroad Co.*, in which this court stated it is "absurd" to believe the average layman knows the necessities of railroad crossing safety.[8] This language was in reference to the district court's exclusion in *Young* of an expert on crossing safety.

Baker's expert offered opinion testimony that was challenged and rebutted by another expert who testified that he did not believe a flagman was necessary. The district court did not err in denying Baker's motion for judgment in this regard.

III

Baker argues that the district court erred in its jury instructions and in denying his motion for a new trial. We review challenges to jury instructions for an abuse of discretion and will reverse the judgment only if the charge as a whole creates a substantial doubt as to whether the jury has been properly guided in its deliberations.[9]

In diversity actions, a federal court's jury instructions must accurately describe the applicable state substantive law, but the district court has wide

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[8] 618 F.2d 332, 338 (5th Cir. 1980).

[9] *Dahlen v. Gulf Crews, Inc.*, 281 F.3d 487, 494 (5th Cir. 2002).

discretion in formulating the charge.[10] We review de novo a district court's determination of a question of state law, but a party is entitled to reversal for a district court's failure to give a particularly requested instruction only if the jury was misled by the given instructions.[11]

A

Baker first argues the district judge refused to add to the Special Verdict form his claim that Illinois Central violated its common law duty of ordinary care when it failed to provide a flagman to the Hancock crew. Specifically, Baker argues the jury was not given an opportunity to address this issue since by answering "no" to Special Interrogatory 6 – whether the crossing was extra-hazardous – the jury never reached Special Interrogatory 7 – whether reasonable care required extra precautions.

The district court's arrangement of the Special Interrogatories was correct in light of Mississippi law. Mississippi law generally only requires that a railroad erect a crossbucks at its crossing.[12] If the crossing is extra-hazardous, Mississippi law imposes a duty upon railroads to provide additional warning

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[10] *Broad. Satellite Int'l v. Nat'l Digital Television Ctr.*, 323 F.3d 339, 347 (5th Cir. 2003).

[11] *Folks v. Kirby Forest Indus. Inc.*, 10 F.3d 1173, 1174 (5th Cir. 1994).

[12] MISS. CODE ANN. § 77-9-247.

measures.[13] Moreover, the Mississippi Supreme Court has stated it "know[s] of no statute or other authority placing this duty [to have a flagman] on the railroad as a matter of law."[14] That court has also held that, in the absence of an extra-hazardous finding, the use of crossbucks met the reasonable care the law requires.[15] The district court did not err when it predicated Special Interrogatory 7 on a finding that the crossing was extra-hazardous.

B

Baker argues the district court incorrectly instructed the jury that the RWPR did not apply to him if he could approach the crossing in the same manner as an ordinary motorist. This instruction did not improperly guide the jury because in response to Baker's RWPR claims, the jury found that his work did not require him to foul the tracks. Accordingly, the jury did not find the factual predicate triggering the RWPR's protections.

C

Baker contends the district court's instructions repeatedly stated that Mississippi law required

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[13] *Donald v. Gulf M. & O. R.R.*, 71 So.2d 776, 777 (Miss. 1954).

[14] *New Orleans v. N.E.R. Co. v. Ready*, 118 So.2d 185, 188 (Miss. 1960).

[15] *Wilner v. Miss. Exp. R.R.*, 546 So.2d 678, 682 (Miss. 1989).

Illinois Central to install additional warning devices only if the crossing were extra-hazardous. Baker claims this was prejudicial because it unduly emphasized Illinois Central's position.

This argument has no merit. The district court instructed the jury that Baker alleged the crossing was extra-hazardous and listed the elements he was required to prove. The district court defined "extra-hazardous" in a manner that was not prejudicial to Baker.[16] The district court concluded by advising the jury as to Mississippi's statutory requirements. Baker cites one case, which is easily distinguishable.[17] The instructions were correct statements of Mississippi law and not unnecessarily repetitive.

D

Baker next argues that the district court erred when it instructed the jury three times regarding Baker's duty to stop. He argues one instruction was sufficient, and that the additional two instructions confused the jury or suggested that Baker's failure to stop was the sole cause of the collision. The district

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[16] "[A]ny condition affecting the danger of a crossing may be considered in determining whether the crossing is extrahazardous."

[17] *Hanover Fire Ins. Co. v. Sides*, 320 F.2d 437, 444 (upholding a district court's decision to refuse six additional instructions with respect to duties Louisiana law imposed on a driver making a left-hand turn after the district court had already instructed the jury on that issue).

court did not err because each instruction was based on a separate statutory duty.[18]

Nor did the district court err when it did not use Mississippi state-approved jury instructions with respect to these particular instructions. While the district court's instructions regarding state substantive law must be accurate, the trial judge is given discretion in formulating the specific charge.[19]

E

Baker asserts that his physician testified that Baker could not perform work of any kind due to his intermittent physical and mental impairments and that the district court erred in instructing the jury to consider his ability to mitigate his damages. Baker cites several Mississippi workers' compensation cases for the proposition that a factfinder commits reversible error when it ignores testimony of the plaintiff's treating physicians,[20] and he concludes there was no

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[18] MISS. CODE ANN. § 77-9-249(1) (requiring a driver to stop at railroad tracks when locomotive emits signal within nine-hundred feet of crossing); MISS. CODE ANN. § 77-9-249(4) (requiring a driver to stop at crossbucks regardless of train's approach); MISS. CODE ANN. § 63-3-1009 (requiring a driver to stop at stop signs erected near railroad crossings).

[19] *Broad. Satellite Int'l. v. Nat'l Digital Television Ctr.*, 323 F.3d 339, 347 (5th Cir. 2003).

[20] *See Stewart v. Singing River Hosp. Sys.*, 928 So.2d 176, 183 (Miss. App. 2005); *Johnson v. Ferguson*, 435 So.2d 1191, 1193-95 (Miss. 1983).

evidence to support such an instruction, citing *Roberts v. Wal-Mart Stores, Inc.*[21]

The record, including Baker's own evidence, reflects no error. Illinois Central presented evidence that Baker renewed his commercial drivers' license, regularly drove his own automobile, and traveled on his own. Baker also routinely visited casinos and businesses. Illinois Central's surveillance footage showed Baker squatting and walking. Finally, Baker's own physician testified "there were certainly some jobs [Baker] could perform."

IV

Baker contends that the jury's findings were against the great weight of the evidence, and the district court therefore erred in denying his motion for a new trial. We apply a deferential standard in reviewing a trial court's refusal to grant a motion for new trial. We will not reverse the trial court's decision unless there is a clear showing of abuse of discretion.[22] A "clear showing" requires that the appellant

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[21] 7 F.3d 1256, 1258 (5th Cir. 1993) ("A district court may not instruct a jury on a legal theory in support of which no evidence is presented.").

[22] *Duff v. Werner Enters. Inc.*, 489 F.3d 727, 729 (5th Cir. 2007).

demonstrate "an absolute absence of evidence" to support the jury's verdict.[23]

A

The jury answered "no" to a special interrogatory asking whether Baker's work required him to "foul the tracks." The evidence was disputed on this issue. Additionally, given the undisputed fact that the worksite was twenty to thirty feet from the nearest track, the jury did not err in concluding that the work Hancock performed did not require Baker or his co-workers to foul the track.

Baker argues that a photograph taken immediately after the accident shows that his trailer was in the left lane, rather than the right, a position from which, Baker contends no ordinary motorist would have to approach the crossing. He contends this photograph means the jury's answer to the interrogatory "comes very close to being contrary to incontrovertible physical facts." But this ignores other evidence that reflects Baker could have left the work site and pulled his trailer into the correct lane as another driver testified he had done and, more importantly, evidence that even if Baker's trailer was in the

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[23] *Id.* ("Absent 'a clear showing of an abuse of discretion,' we will not reverse the trial court's decision to deny a new trial. . . . To make such a 'clear showing,' Appellants must demonstrate 'an absolute absence of evidence to support the jury's verdict.' ") (citations omitted).

left lane, he had an unobstructed view of the tracks and could have observed a train approaching had he looked.

B

Baker asserts that the jury's finding that Illinois Central did not violate its duty of ordinary care to provide a flagman is against the great weight of the evidence. For reasons already discussed, this contention has no merit.

V

Baker challenges several evidentiary rulings, arguing he is entitled to a new trial. We review admissions of evidence and denial of a new trial under an abuse of discretion standard.[24] We conclude the district judge either was within his discretion or committed only harmless error.

A

The district court excluded evidence of the subsequent installation of lights and gates at the crossing where the accident occurred. The evidentiary rules generally ban the admission of evidence concerning subsequent remedial measures.[25] However, a party

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[24] *Chiasson v. Zapata Gulf Marine Corp.*, 988 F.2d 513, 515 (5th Cir. 1993).

[25] FED. R. EVID. 407.

may introduce such evidence for a purpose besides demonstrating negligence – such as, ownership, control, or feasibility of precautionary measures.[26]

Baker argues that Illinois Central presented evidence that disputed whether lights and gates would have made Baker safer that day. Specifically, Baker cites the locomotive engineer's testimony that "gates are probably not as safe as just a stop sign and crossbuck" and that any crossing design expert who believed otherwise "could come ride that train with me and they will see I'm right."

Baker relies on *Muzyka v. Remington Arms* to prove admissibility, in which we held that the district court erred when it excluded evidence of a subsequent redesign for impeachment purposes.[27] Remington's numerous experts called the rifle the safest in the world and stated that the flaw plaintiff alleged presented no danger to consumers, despite the fact that Remington subsequently corrected the alleged flaw.[28] After the plaintiff suggested Remington could have redesigned the rifle in the manner the company ultimately did, one expert replied "you want Remington to depart from the judgment of the entire firearm's industry."[29] We noted that the jury was required to choose between two theories of the case: the rifle

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[26] *Id.*

[27] 774 F.2d 1309, 1314 (5th Cir. 1985).

[28] *Id.* at 1311-14.

[29] *Id.* at 1312.

unexpectedly fired because of a either a flaw or mishandling. We concluded it was error to deny the jury evidence impeaching the numerous experts who spoke of the rifle in superlatives.[30]

We decline to analogize the analysis of Remington's numerous experts to the lone opinion of Illinois Central's locomotive engineer, a lay witness. Moreover, when the decision to admit or exclude evidence of a design change is a close call, a district court's decision to exclude the evidence is within its discretion.[31] Given that the lights and gates were installed two years after the accident, and Baker's almost exclusive reliance on Dunn's testimony as Illinois Central's denial of feasibility, we conclude the district court did not abuse its discretion.

B

The district court did not permit Baker's expert, Edward Stanton, to testify as to the legal meaning of terms used in the RWPR, which went into effect in 1996. Stanton last worked for a railroad in 1948 and as a railroad contractor in 1987 and stated he had to look up the regulation after his deposition, presumably to familiarize himself with it. The FRA has given the RWPR's terms specialized meaning, and the district court did not abuse his discretion by

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[30] *Id.* at 1313.

[31] *Hardy v. Chemetron Corp.*, 870 F.2d 1007, 1011 (5th Cir. 1989).

excluding Stanton's interpretation of a regulation with which he admitted he had little experience.[32]

C

The district court excluded evidence of a prior accident. Admissibility of such evidence is determined on a case-by-case basis, with the court considering various factors including the theory of recovery, the defendant's defenses, and the degree of similarity between the other accidents.[33]

Baker argues *Brazos River Authority* requires a district court to admit evidence of prior accidents if there are any similarities, leaving the jury to determine the degree of similarity.[34] The only prior accident about which the record reflects Baker sought to adduce evidence involved a car stalled on the tracks. Even if the trial judge should have admitted evidence of that prior accident, and left the jury to determine the degree of similarity, it was harmless error since it did not affect Baker's substantial rights. We conclude the jury would not have ruled differently based on a single prior and substantially dissimilar accident.

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[32] FED. R. EVID. 602.

[33] *Brazos River Auth. v. GE Ionics*, 469 F.3d 416, 426 (5th Cir. 2006).

[34] *Id.*

D

Baker retrieved from Illinois Central's website and attempted to introduce a document regarding a company policy to use flagmen whenever workers are within twenty-five feet of the track. Illinois Central objected that Baker failed to lay a proper foundation because he could not prove the policy was in effect at the time of the accident. Without such proof, the policy was a subsequent remedial measure, argued Illinois Central, and was prohibited by the rules of evidence. Illinois Central also argued that the document violated the motion in limine because the policy was that of its subsidiary corporation. Baker failed to establish when the policy was created or rebut Illinois Central's claim that the policy was that of its subsidiary. Thus, the judge did not err in excluding it as substantive evidence.[35]

E

The district court admitted surveillance videos of Baker. Baker argues that the videos (1) were disclosed after the discovery cutoff; (2) did not impeach the plaintiff's witnesses; and (3) were more prejudicial than probative. The surveillance videos show Baker engaging in a variety of daily chores, driving, spending full days at crowded casinos, and making routine transactions at banks, grocery stores, and insurance agencies. Illinois Central argues the videos

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[35] FED. R. EVID. 407.

are both substantive evidence of Baker's post-accident condition and impeachment evidence challenging Baker's witnesses who described his mental and physical condition. For example, two of Baker's medical experts testified that Baker had mental problems and memory problems, was incapable of managing his financial affairs (including simple tasks, such as making change and counting money), should not drive, had difficulty dealing with crowds, and needed to live in an assisted living facility.

Baker cites *Chiasson v. Zapata Gulf Marine Co.*[36] arguing that it is reversible error to admit surveillance evidence that was not disclosed during the discovery period. This is incorrect. *Chiasson* dealt with a surveillance video that was *never* disclosed to the plaintiff before trial despite the plaintiff's interrogatory regarding the existence of still or motion pictures of the plaintiff.[37] The defendant responded to the interrogatory by citing "attorney work-product privilege." The defendant, thereafter, surveilled and recorded the plaintiff and did not supplement its discovery response. During the trial, the district court ruled the defendant could show the surveillance tape to the jury and denied the plaintiff's request to preview the tape. We concluded that, regardless of any impeachment value, the video was of a substantive nature. Therefore we held that the district court

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[36] 988 F.2d 513 (5th Cir. 1993).

[37] *Id.* at 518.

erred by admitting substantive evidence undisclosed before trial. We did not hold, as Baker contends, that a surveillance tape disclosed after the discovery cutoff, but before trial, is automatically inadmissible.[38]

Here, Illinois Central produced the surveillance footage in two supplemental responses to Baker's interrogatories approximately nine to ten months before trial. Thus, *Chiasson* did not require the district court to exclude the videos, which we conclude were properly admitted as substantive evidence.

Baker contends the district court should have excluded the video because it was more prejudicial than probative.[39] Specifically, Baker notes that the surveillance footage shows him spending long periods of time in casinos and draws a connection between that footage and Illinois Central's closing argument, in which its attorney stated Baker had "gambled with his life" by running the stop sign. Baker argues that

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[38] *See id.; see also Whittaker Corp. v. Execuair Corp.*, 736 F.2d 1341, 1347 (9th Cir. 1984) ("District courts do have power to prescribe time limits for conducting discovery. The purpose of a discovery cutoff date is to protect the parties from a continuing burden of producing evidence and to assure them adequate time to prepare immediately before trail [sic]. A discovery cutoff date does not, however, affect admissibility of evidence obtained outside of the discovery process of the case in which cutoff is ordered.") (citations omitted).

[39] FED. R. EVID. 403.

this evidence informed jurors that he engaged in activities many people consider immoral.

Rule 403 requires that the probative value of the evidence must be "substantially outweighed by the danger of unfair prejudice" before the court may exclude the disputed evidence.[40] Unfair prejudice is not satisfied by evidence that is "merely adverse to the opposing party."[41] For that reason, district courts should apply Rule 403 sparingly.[42] Rule 403's "major function is limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect."[43] Rule 403 is not designed to "even out" the weight of the evidence.[44] Baker's post-accident quality of life was hotly disputed, and Baker's witnesses testified in detail regarding the allegedly severe post-accident limitations Baker faces, including the inability to count money, make change, or be in crowds. The video's probative value contradicting these statements weighs heavily against a hypothetical juror's moral aversion to gambling. The district court did not abuse its discretion by allowing the surveillance footage.

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[40] *Id.*

[41] *Brazos River Auth. v. GE Ionics*, 469 F.3d 416, 427 (5th Cir. 2006).

[42] *United States v. McRae*, 593 F.2d 700, 708 (5th Cir. 1979).

[43] *Id.*

[44] *Id.*

F

Baker challenges the district court's admission of two neurology reports during the cross-examination of his son, Baker, Jr. These neurology reports composed one of Baker's exhibits. Baker, Jr., testified regarding his father's mental and physical condition. Illinois Central attempted to rebut his testimony by reading from these reports and asking Baker, Jr., whether the reports were read correctly. Among other findings, the reports suggested that Baker may have purposely performed poorly on various physical examinations. Baker argues that Baker, Jr., was not present during these examinations and lacked personal knowledge. Thus, Baker argues Rule 602[45] prevented his son from testifying as to the events the reports discussed.

Even if the reports were improperly used with this witness, which we do not resolve, their use did not prejudice Baker. Pre-trial, he had introduced these documents as his own exhibit. Baker cannot claim that the contents of reports he introduced prejudiced him.

* * *

We have reviewed the numerous errors Baker alleges, and we find none of his arguments persuasive. We therefore AFFIRM the district court.

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[45] FED. R. EVID. 602.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60138

D.C. Docket No. 3:03-CV-905

CHARLES E BAKER

Plaintiff-Appellant

v.

CANADIAN NATIONAL/
ILLINOIS CENTRAL RAILROAD

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

JUDGMENT

(Filed July 16, 2008)

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE: AUG 25 2008

A True Copy
Attest

Clerk, U.S. Court of Appeals,
Fifth Circuit

By: /s/ Dawn D. Victoriano
Deputy

New Orleans, Louisiana

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CHARLES BAKER — PLAINTIFF

VS. — CIVIL ACTION NO. 3:03CV905LN

CANADIAN NATIONAL/
ILLINOIS CENTRAL
RAILWAY COMPANY — DEFENDANT

MEMORANDUM OPINION AND ORDER

There are pending in this cause several motions that are now fully briefed and ripe for consideration, including:

(1) Defendant Canadian National/Illinois Central Railway Company's motion for summary judgment, or in the alternative, for partial summary judgment;

(2) Plaintiff Charles Baker's motion for partial summary judgment;

(3) Defendant's *Daubert* motion to exclude testimony of plaintiff's expert Edward Stanton;

(4) Defendant's *Daubert* motion to exclude the testimony of plaintiff's expert James R. Loumiet;

(5) Plaintiff's motion to exclude certain testimony from defendant's expert Mike McDonald; and

(6) Plaintiff's motion to exclude certain testimony from defendant's expert Stephen Chewning.

The Accident

This case arises out of a grade crossing accident that occurred on June 27, 2000 in Hinds County, Mississippi. On that date, plaintiff Charles Baker was working as a dump truck driver for Hancock Construction, which had been hired by Illinois Central to remove vegetation and earth located near the Greens Road railroad crossing. Baker and other truck drivers were responsible for hauling away loads of vegetation, dirt and other debris removed by other members of the Hancock crew from the site and transporting them to a nearby dump, located somewhere on the other side of the tracks. The accident at issue occurred when Baker was proceeding from the worksite with his loaded truck. As Baker entered the crossing heading east toward the dump, his truck was struck by a northbound freight train, resulting in injury to Baker.

Plaintiff's Complaint

Plaintiff has set forth multiple allegations of negligence stemming from the accident. He alleges that the train crew was negligent in failing to keep a reasonable and proper lookout; in failing to keep the train under proper and reasonable control; in failing to adequately warn of the train's approach as required by Mississippi Code Annotated § 77-9-225; and in operating the train at an excessive rate of speed under the circumstances. He further alleges that Illinois Central was negligent because the train

crossing was "extra hazardous," thereby requiring additional warning devices to warn motorists of approaching trains. Finally, he alleges that the work he was performing on the date of the accident fell under the Roadway Worker Protection Rules codified at 49 C.F.R. § 217.4, and that therefore, Illinois Central should have had a flagman on duty at the job site to warn Baker of approaching trains.

Defendant's Answer

In its answer and counterclaim, Illinois Central denies that it was negligent in causing or contributing to the subject collision. It maintains that its employees used due care in operating the train, that the subject crossing was reasonably safe for motorists exercising reasonable care for their own safety, that there was more than adequate sight distance for Baker to be able to see an oncoming train and to stop in time to avoid the collision, and that the accident was caused solely by Baker's negligence in failing to exercise reasonable care for his own safety.

Cross-Motions for Summary Judgment:
Roadway Worker Protection Rules

Plaintiff's motion for summary judgment seeks to impose liability on Illinois Central for its alleged failure to comply with the Roadway Worker Protection Rules. Defendant disputes that these rules are applicable and has so contended in its own motion for summary judgment. The court, having considered the

parties' arguments and reviewed the record evidence, finds that it is unable to determine from the undisputed facts of record whether these rules apply and therefore, plaintiff's motion for summary judgment will be denied as will defendant's motion as it pertains to plaintiff's allegations that the Roadway Worker Protection Rules were violated.

The Roadway Worker Protection Rules (RWPR), which became effective in January 1997, were promulgated under § 8 of the Rail Safety Enforcement and Review Act, 49 U.S.C. § 20142. The rules require that each railroad devise and adopt a program of on-track safety to protect employees working along the railroad, i.e., "roadway workers," from the hazards of being struck by a train or other on-track equipment. 49 C.F.R. § 214.301 (express purpose of rules is "prevent[ing] accidents and casualties caused by moving railroad cars, locomotives or roadway maintenance machines striking roadway workers or roadway maintenance machines.").[1] The RWPR defines "roadway worker" to mean

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[1] Pursuant to the directive in The Rail Safety Enforcement and Review Act of 1992 that the Secretary of Transportation review and revise federal rules relating to railroad track safety, 49 U.S.C. § 20142, the Federal Railway Administration conducted a study and found that from 1989 to 1993 twenty-two roadway workers were struck and killed by trains or on-track equipment. This finding prompted the formation of a federal advisory committee which formulated the rules for worker safety which are the RWPR. *See Association of American Railroads v.*

(Continued on following page)

> any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.

49 C.F.R. § 214.7. "Fouling a track" is defined to mean

> the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

Id. 49 C.F.R. § 214 335(a) provides that

> No employer subject to the provisions of this part shall require or permit a roadway worker who is a member of a roadway work group to foul a track unless on-track safety is provided by either working limits, train approach warning, or definite train location in accordance with the applicable provisions of §§ 214.319, 214.321, 213.323, 214.325, 214.327, 214.329 and 214.331 of this part.

Department of Transp., 198 F.3d 944, 946, 339 U.S. App. D.C. 197, 199 (D.C. 1999); *see also* 49 C.F.R. §§ 214.301-214.355.

Illinois Central maintains that RWPR does not apply and Baker does not fall within the class of persons protected by RWPR because he did not meet the definition of roadway worker fouling the tracks for two reasons.[2] First, on the date of the accident, neither Baker nor any of his coworkers were performing any work on any "railroad track, bridges, roadway, signal and communications systems, electric traction systems, roadway facilities or roadway maintenance machinery;" rather, they were merely working to clear the right-of-way. Second, while Baker did go onto the tracks when his vehicle entered the crossing, at the time he went onto the tracks, he was simply a private motorist on a public road. That is, once Baker pulled onto the public road, leaving the defendant's right-of-way, he was a private motorist approaching a public crossing and as such, was entitled to no more or less protection than any other motorist on a public road.

In support of the first of these arguments, defendant insists that the term "roadway" in the RWPR is not synonymous with "right-of-way"; rather, "roadway" refers to "the area on which the railroad constructs its road-bed and lay[s] its tracks." *See CSX Transp., Inc. v. Chicago and North Western Transp. Co.*, 1994 WL 406546 (N.D. Ill. 1994). In the court's

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[2] The parties apparently agree that if the rules apply, they were violated, for it is undisputed that Illinois Central took no extra precautions to protect Davis and his coworkers from injuries caused by moving trains.

opinion, however, the more reasonable interpretation of the term roadway, as used in the RWPR, includes not only the roadbed, but also the right-of-way, given that the RWPR is broadly designed to protect those whose duties for and on behalf of the railroad would place them in such proximity to the tracks as to put them at risk of injury from moving trains or railway equipment.[3] Whether the work being performed by Baker and his coworkers qualifies in that respect, however, is another matter.

The evidence, including photographic evidence of the worksite, seems to indicate that the Hancock workers, while doing the actual clearing work, were physically located in an area thirty to eighty feet from the railroad tracks and thus while doing that work,

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[3] Illinois Central points out that Baker has "failed to cite any binding authority in which an independent contractor working 30-80 feet from a public railroad crossing clearing vegetation is considered a roadway worker subject to the protection of the RWPR." Yet neither has Illinois Central offered any binding authority in support of its position. The fact is, there is scant authority interpreting the RWPR and none addressing the specific question here presented. It is not surprising, then, that neither side has offered any "binding authority" in support of their respective positions.

The court further notes that it has reached its conclusions regarding the RWPR without reference to the opinions offered by plaintiff's expert, Edward Stanton, or by defense expert Mike McDonald as to the proper interpretation of the RWPR. Thus, the question whether either of these experts' opinions on this point should be stricken, as contended by the parties in their respective motions to exclude these experts' testimony, is essentially moot.

were not likely to foul the tracks. Plaintiff, though, argues that there was a clear potential for fouling the track, in at least three ways. First, he notes that the boom on a trackhoe that was being used by the Hancock crew to excavate dirt and debris could have swung within four feet of the track; yet plaintiff's proof as to this assertion is merely speculative.[4]

His main argument, though, is that he not only had the potential to foul the track, but actually did foul the track when he attempted to cross it in his truck and was struck by the train. Baker submits that when this occurred, he was still performing work in furtherance of maintaining the right-of-way in that he was transporting dirt and debris from the site, as was his charge, and he therefore insists he was entitled to RWPR protections when he undertook to cross the tracks.

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[4] The regulations do contemplate that a person working more than four feet from the track may "still be fouling the track if the person's expected or potential activities or surroundings could cause movement into the space that would be occupied by a train." 61 Fed. Reg. 65969 (Dec. 16, 1996). Here, although plaintiff's expert, Edward Stanton, suggested that the boom of the trackhoe could have fouled the track, he admitted he had made no measurements and thus did not know whether it was ever situated close enough to the track for the boom to have extended into the foul space.

The court notes that defendant has moved to exclude Stanton's testimony in this regard and for the reason given, this motion is well taken.

For its part, Illinois Central reiterates that once Baker pulled onto the public road, leaving defendant's right-of-way, he was no longer a "roadway worker" entitled to RWPR protection (assuming he ever was) but rather at that point became a private motorist approaching a public crossing entitled to no greater protection than any other motorist. Indeed, it notes in this regard that if Baker's theory were accepted, railroads would have the unbearable, and obviously unintended burden of providing RWPR protection to workers working far away from their tracks when those workers, in the course of their workday, have to drive across a public grade crossing. The court fully concurs with defendant that this was not intended by the RWPR. Rather, while a railroad would be required to provide on-track safety for any roadway worker required to cross the tracks on railroad property, i.e., other than at a public crossing, reason strongly dictates that a roadway worker, when traversing a public highway and approaching a public crossing, is a member of the motoring public, and no longer in need of the special protections afforded to him in his capacity as a roadway worker.

Having said that, there appears to be a conflict in the evidence relating to the question whether Baker was able to and whether he did pull onto the road so that he could approach the crossing as would any other motorist. In this vein, defendant's experts have testified based on photographs taken on the day of the accident which purport to depict the worksite that Baker had ample room to drive fully onto the public

road and pull up to the stop sign. Other witnesses have indicated that the photographs were taken later in the day and do not accurately depict the location of the work at the time of the accident, and Baker has himself testified that there was not enough room for him to pull all the way onto the road to approach the crossing and that he instead had to approach the crossing at an angle that prevented his being able to have a clear view to the south.

In the court's opinion, if the location and configuration of the worksite in relation to Greens Road and the subject crossing was such as to prevent Baker from being able to pull fully onto the road and approach the crossing at the same 90 degree angle as any other driver and instead was such as to require that he approach the crossing at a 45 degree angle which would have obscured his view of the tracks to the south, then the RWPR would arguably apply.[5] Practically, to put a worker in this position is little different from requiring a worker to traverse the tracks at a point where there is no recognized crossing. This

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[5] In the court's opinion, if it was reasonably possible for Baker to have pulled onto the road to approach the crossing, then this is what the law would have required of him. *See* 49 C.F.R. 214.313(b) ("A roadway worker shall not foul a track except when necessary for the performance of duty."). The court would further note that the RWPR requires that before fouling a track, a roadway worker "is responsible to ascertain that on-track safety is being provided." 49 C.F.R. § 214.313(c). Inasmuch as it is undisputed that no on-track safety was provided, it would seem that Baker could not have ascertained that on-track safety was being provided.

puts him at greater risk than members of the motoring public and in the court's view, would entitle him to the protection of the RWPR.

Therefore, in view of the disputed facts, the court concludes that plaintiff's motion for partial summary judgment should be denied as should defendant's summary judgment motion on this issue.

Defendant's Motion for Summary Judgment

Illinois Central contends that summary judgment is in order as to all plaintiff's remaining allegations.

If the RWPR were ultimately found to be applicable, then Illinois Central's duties to plaintiff would be determined by reference to those rules, rather than to the rules and principles applicable to members of the motoring public. On the other hand, if the RWPR were inapplicable, then the duties owed to Baker would be those owed to members of the motoring public, and the viability of plaintiff's claims would be gauged by reference to such rules and principles. The following, therefore, for ease of discussion, assumes inapplicability of the RWPR.

1. Alleged Negligence by the Train Crew:

A. Failure to Provide Audible Warning

Illinois Central has argued, and has presented ample supporting evidence that, as required by law, the train crew began sounding the train's horn or bell

prior to the whistle board, which was located 930 feet south of the crossing, and that they continuously sounded the horn or bell until the point of impact. *See* Miss. Code Ann. § 77-9-255 (providing that a train crew approaching a public crossing is required to sound the train's horn or bell 900 feet at repeated intervals prior to the crossing). Plaintiff has offered no contrary proof, and has, in effect, conceded that summary judgment is in order as to his allegation that defendant violated § 77-9-255.

B. Failure to Maintain a Proper Lookout

Plaintiff has also effectively conceded defendant's motion to the extent it seeks summary judgment on his allegation that the train crew failed to maintain a reasonable and proper lookout and to keep the train under reasonable and proper control. In support of its motion, Illinois Central has presented the affidavit of the train's engineer, Richard Dunn, who states that he maintained a constant lookout in front of the train as it approached the crossing and that he did see plaintiff's dump truck as it approached the crossing, but that he expected it to stop at the stop sign and yield to the approaching train as required by Mississippi law. *See* Miss. Code Ann. § 77-9-249 (setting forth duty of motorist to stop at crossing when train is approaching); *Woods v. Amtrak,* 982 F. Supp. 409 (N.D. Miss. 1997) (finding no duty to stop or slow the train for approaching vehicle as "engineer was entitled to assume that the plaintiff would stop for an approaching train"); *Wilner v. Mississippi Export R.*

Co., 546 So. 2d 678, 681-82 (Miss. 1989) (holding that railroad was entitled to assume that approaching motor vehicle drivers would slow sufficiently to see whether or not a train was on or near the crossing). Moreover, defendant has offered uncontroverted proof that once it became apparent to Dunn that Baker was not going to stop, there was not sufficient time to measurably slow or stop the train prior to impact.

In view of these undisputed facts, the court concludes that summary judgment is proper on plaintiff's claims for negligence in failing to maintain a proper lookout and to maintain the train under reasonable control.

C. Excess Train Speed and Failure to Slow/Stop Train

It is undisputed that the subject train was running between 55-58 miles per hour as it approached Greens Road crossing and thus was traveling within the applicable federal speed limit. Nevertheless, plaintiff maintains that Illinois Central was negligent in not issuing a slow order in view of the work that was being performed by the Hancock crew in the vicinity of the tracks on the date of the accident. In the court's opinion, plaintiff's claim in this regard is preempted by the Federal Railroad Safety Act (FRSA). Congress enacted the FRSA "to promote safety in every area of railroad operations and reduce railroad-related accidents and incidents." 49 U.S.C. § 20101. The Act, which authorizes the Secretary of

Transportation "to prescribe regulations and issue orders for every area of railroad safety," 49 U.S.C. § 20103(a), contains an express preemption clause which provides:

> Laws, regulations, and orders related to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety until the Secretary of Transportation prescribes a regulation or issues an order covering the subject matter of the State requirement.

49 U.S.C. § 20106. The statute has a savings clause which provides:

> A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order –
>
> (1) is necessary to eliminate or reduce an essentially local safety hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

Id. In *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658, 113 S. Ct. 1732, 123 L. Ed. 2d 387 (1993), the Supreme Court noted that the Secretary of Transportation, after taking into account the hazards posed by track conditions, set maximum allowable

operating speeds for all trains for each class of track and those federal regulations substantially subsumed the subject matter of the relevant state law. *Id.* at 673-75, 113 S. Ct. at 1743 (citing 49 C.F.R. § 213.9(a) (1992)). The Court thus held that a claim that defendant's train was traveling at an excessive speed, given the time and place, was preempted. *Id.* at 675, 113 S. Ct. at 1743-44. That is, the Court held that the speed limits established by the Secretary of Transportation must be read "as not only establishing a ceiling, but also precluding additional state regulation based on common law speed restrictions." *Id.* at 673, 113 S. Ct. at 1743. In accordance with *Easterwood,* therefore, "[c]laims for excessive speed are preempted if the train is indisputably traveling within the federal speed limit set for that particular class of track." *Stuckey v. Illinois Central R. Co.,* 1998 WL 97270, *5 (N.D. Miss. 1998) (citing *Easterwood*).

Although the Court in *Easterwood* found that excessive speed claims are preempted, the Court noted that "related tort law duties, such as the duty to slow or stop a train to avoid a specific, individual hazard" might not be preempted, 507 U.S. at 675 n.15, 113 S. Ct. at 1743 n.15, though it declined to address "the question of FRSA's pre-emptive effect on such claims,"[6] *id.,* 113 S. Ct. at 1743 n.15. In *Hesling*

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[6] The Court stated:

> [T]he pre-emption of respondent's excessive speed claim does not bar suit for breach of related tort law duties, such as the duty to slow or stop a train to

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v. CSX Transportation, Inc., the Fifth Circuit observed that

> [t]he term specific, individual hazard means a "discrete and truly local hazard." *Seyler v. Burlington N. Santa Fe Corp.*, 102 F. Supp. 2d 1226, 1236 (D. Kan. 2000) (citations omitted). It "relates to the avoidance of a specific collision." *Armstrong v. Atchison, Topeka & Santa Fe Ry. Co.*, 844 F. Supp. 1152, 1153 (N.D. Tex. 1994). A condition that can be or is present at many, or most sites cannot be a specific, individual hazard. *See, e.g., Earwood v. Norfolk S. Ry. Co.*, 845 F. Supp. 880, 888 (N.D. Ga. 1993); *see also Bowman v. Norfolk S. Ry. Co.*, 832 F. Supp. 1014 (D.S.C. 1993). Most courts have rejected plaintiffs' claims of a specific, individual hazard, finding instead that the circumstances are preempted.

396 F.3d 632, 640 (5th Cir. 2005). It has been consistently emphasized that the kinds of conditions that could constitute a "specific individual hazard" are limited to transient conditions that could lead to an imminent collision, such as a child standing on the

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> avoid a specific, individual hazard . . . As respondent's complaint alleges only that petitioner's train was traveling too quickly given the "time and place" . . . this case does not present, and we do not address, the question of FRSA's pre-emptive effect on such related claims.

CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 675 n.15, 113 S. Ct. 1732, 1743 n.15 (1993).

railway or a motorist stranded on a crossing or improperly parked tank cars which obstruct the view of the train engineer.[7] *See Seyler v. Burlington Northern Santa Fe Corp.*, 102 F. Supp. 2d 1226, 1236 (D. Kan. 2000).[8] In the case at bar, Baker submits that the

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[7] While some courts have regarded the "essentially local safety hazard" exception in the savings clause of 49 U.S.C. § 20106 and the "specific individual hazard" exception recognized by the Court in *Easterwood* as synonymous and have used the terms interchangeably, *see, e.g., Gunn v. Atchison, Topeka and Santa Fe Ry. Co.*, 13 S.W.3d 52, 54 (Tex. Ct. App. 1999) (stating that "the 'a specific individual hazard' wording . . . was used by the *Easterwood* court as a substitute for the statutory 'an excessively local safety hazard' language"), others have recognized these exceptions as distinct, *see, e.g., Stevenson v. Union Pacific R. Co.*, 110 F. Supp. 2d 1086, 1088-1089 (E.D. Ark. 2000) ("A 'specific, individual hazard' is not to be confused with the statutory 'essentially local safety hazard' set forth in 49 U.S.C. § 20106."); *Hightower v. Kansas City Southern Ry. Co.*, 70 P.3d 835, 846-47 (Okla. 2003) (noting distinction). In this court's view, the Supreme Court's reference to an exception for specific, individual hazards clarified that in addition to, or as a facet of a state's right to regulate as to essentially local safety hazards, federal regulations do not diminish the train crew's duty to exercise reasonable care to slow or stop the train to avoid an imminent collision.

[8] In *Seyler v. Burlington Northern Santa Fe Corp.*, 102 F. Supp. 2d 1226, 1236 (D. Kan. 2000), cited approvingly by the Fifth Circuit in *Hesling*, the court gave examples of circumstances which had been found by courts to not constitute specific, individual hazards:

> *See Cox v. Norfolk and Western Ry. Co.*, 998 F. Supp. 679, 687 (S.D.W.Va. 1998) (snow covered crossing); *O'Bannon v. Union Pac. R.R. Co.*, 960 F. Supp. 1411 (W.D. Mo. 1997) (inadequate warning devices, grade/angle of crossing, proximity to highway), *aff'd*, 169 F.3d 1088 (8th Cir. 1999); *Herriman v. Conrail Inc.*,

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work of the Hancock crew at the Greens Road crossing fits the definition of a specific, individual hazard, because in setting applicable speed limits, federal regulators obviously did not "account[ ] for the possibility of a two-day construction job involving truck-drivers repeatedly driving across a crossing to dump vegetation and other debris removed from near the adjacent railroad track when they established the track classification."[9] *See Hightower v. Kansas City*

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883 F. Supp. 303, 307 (N.D. Ind. 1995) (inadequate lighting at crossing); *Wright v. Illinois Cent. R.R. Co.*, 868 F. Supp. 183, 187 (S.D. Miss. 1994) (vegetation, grade/angle of crossing, inadequate warnings); *Williams v. Alabama Great Southern R. Co.*, 1994 WL 419863, at 2 (E.D. La. 1994) (presence of fog and brick facility); *Earwood v. Norfolk Southern Ry. Co.*, 845 F. Supp. 880, 888 (N.D. Ga. 1993) (congested intersection, impaired visibility); *Armstrong v. Atchison, Topeka & Santa Fe Ry. Co.*, 844 F. Supp. 1152 (W.D. Tex. 1994) (high traffic area without automatic gate and flashing light signals); *Bowman v. Norfolk Southern Ry. Co.*, 832 F. Supp. 1014 (D.S.C. 1993) (same), *aff'd*, 66 F.3d 315 (4th Cir. 1995); *but cf. Stone v. CSX Transp., Inc.*, 37 F. Supp. 2d 789, 795-96 (S.D. W.Va. 1999) (repeated signal apparatus malfunctions at particular crossing constituted local hazard); *Bakhuyzen v. National Rail Passenger Corp.*, 20 F. Supp. 2d 1113, 1117-18 (W.D. Mich. 1996) (poor visibility due to snow constituted specific individual hazard).

[9] Though Illinois Central has cited numerous cases holding that alleged hazards such as limited sight distances, vegetation and overgrowth do not constitute specific individual hazards, *see, e.g., Stevenson v. Union Pacific R. Co.*, 2000 WL 1239737, *5 (E.D. Ark. 2000), plaintiff undertakes to clarify in his response that he is not claiming that the condition of the crossing constituted a specific, individual hazard, and he purports to recognize

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Southern Ry. Co., 70 P.3d 835, 847-48 (Okla. 2003) (defining "specific, individual hazard" as "a person, vehicle, obstruction, object, or event which is not a fixed condition or feature of the crossing and which is not capable of being taken into account by the Secretary of Transportation in the promulgation of uniform, national speed regulations") (citations omitted). In the court's opinion, however, the mere fact of workers in proximity to the tracks whose work requires them to frequently traverse a public crossing in dump trucks cannot reasonably be said to be a specific individual hazard as contemplated by *Easterwood*. Simply put, this is "[a] condition that can be or is present at many sites" and thus is not a specific, individual hazard. *See Hesling*, 396 F.3d at 640. Indeed, as the Sixth Circuit recognized in *Ludwig v. Norfolk Southern Railway Co.*, 50 Fed. Appx. 743, 748, 2002 WL 31554085, 4 (6th Cir. 2002),

> [C]onstruction at intersections is common and present around the country at many locations. Construction in the vicinity of the crossing is not the unique circumstance that the "specific, individualized hazard" exemption covers.

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that those conditions are not typically transient but rather more in the nature of a general condition of the crossing which the train speed regulations should cover. He emphasizes that his claim, instead, is that a slow order should have been issued in view of the work of the Hancock crew near and across the tracks.

For these reasons, the court concludes that plaintiff's claim that the train was traveling at an excessive rate of speed in view of the Hancock crew's work is preempted and that plaintiff thus has no viable claim in this regard, inasmuch as the train was traveling at a lawful rate of speed.

2. Alleged Negligence Based on Conditions of the Crossing

A. Inadequate Sight Distance

Among other things, plaintiff alleges that Illinois Central was negligent because he did not have enough sight distance down the track to see an approaching train. Defendant argues that plaintiff's claim fails as a matter of law for one or more of several reasons, namely, because (1) this claim is intimately connected with the work Baker and the Hancock crew were performing on the date of the accident; (2) it is undisputed that when Baker's dump truck was at the stop sign, the train was clearly visible; (3) it is undisputed that Baker never looked for an approaching train; and (4) photographs taken on the date of the accident show there were no obstructions on Illinois Central's right-of-way which could have prevented Baker from seeing an approaching train had he bothered to look.

i. Intimately Connected with the Work

As a general rule, "[t]he owner (or possessor) of a building (or premises) owes a duty to an independent

contractor (and its employees) . . . to furnish a reasonably safe place to work or give warning of danger." *Buford v. Jitney Jungle Stores of America, Inc.*, 388 So. 2d 146, 147-148 (Miss. 1980) (quoting *Mississippi Chemical Corp. v. Rogers*, 368 So. 2d 220, 222 (Miss. 1979)). However,

> [a]s an exception to the general rule requiring the owner or occupier of premises (the contractee) to furnish a safe place of work to an independent contractor and the latter's employees, the owner or occupier is under no duty to protect them against risks arising from or intimately connected with defects of the premises, or of machinery or appliances located thereon, which the contractor has undertaken to repair. Closely related to this exception is the rule that the owner is not liable for death or injury of an independent contractor or one of his employees resulting from dangers which the contractor, as an expert, has known, or as to which he and his employees 'assumed the risk.'

United Roofing & Siding Co. v. Seefeld, 222 So. 2d 406, 408 (Miss. 1969). *See also Magee v. Transcontinental Gas Pipe Line Corp.*, 551 So. 2d 182, 185 (Miss. 1989) (stating that "where a party . . . contracts with another . . . to perform original construction or repair work . . . and devolves upon the contractor the right and fact of control of the premises and the nature and details of the work, the owner has no liabilities for injuries experienced by the contractor's workers

where those injuries arose out of or were intimately connected with the work").

Illinois Central here submits that inasmuch as Hancock Construction and Baker were hired as independent contractors to remove vegetation and to improve the sight distance at Greens Road crossing, then Baker is foreclosed by the "intimately connected" exception from claiming that inadequate sight distance was a cause or contributing cause of the subject accident. The court concludes otherwise.

The exception on which Illinois Central relies is a premises liability concept, as it is an exception to a premises owner's duty to provide a safe place to work. Thus, the court is dubious as to the applicability of the general rule or the exception where the putative injury occurs off the owner's premises. *Cf. Stokes v. Emerson Elec. Co.*, 217 F.3d 353, 358 (5th Cir. 2000) (concluding that "the exception applies only in instances in which the contractors' employees were injured while engaged directly in labor that was dedicated exclusively to the contractors' jobs and in the areas where those jobs must be performed"). Moreover, application of the exception is patently inconsistent with and inimical to the RWPR.

Here, Illinois Central has sought to avoid application of the RWPR on the basis that Baker, though admittedly engaged in the job he had been hired to perform at the time of his injury, was on a public roadway/crossing when the accident occurred and was no longer on the worksite. Accepting Illinois Central's

position for the sake of argument, the court could not reasonably conclude that the "intimately connected" exception applies.[10] Put another way, if one were to conclude the injury occurred on the jobsite, then it would follow that RWPR applies, a conclusion which Illinois Central vigorously denies; and so far as the court is aware, there is no "intimately connected" or analogous exception to the RWPR.

Moreover, "[w]hile the general rule is that the owner of the premises does not have a duty to protect an independent contractor against risks arising from or intimately connected with the work, there is an exception where the owner maintains substantial de jure or de facto control over the work to be performed." *Coho Resources, Inc. v. McCarthy,* 829 So. 2d 1, 13 (Miss. 2002). Here, plaintiff maintains, and in the court's view correctly so, that Illinois Central retained control over the premises and/or over the nature and details of the work, as evidenced, in particular, by the fact that it continued to run its trains through the crossing at a time when the work was being performed. For this reason, as well, Illinois Central cannot successfully invoke the "intimately connected" exception.

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[10] Having said that, it is arguable that the "knowledge of danger" exception has more relevance, particularly given plaintiff's acknowledgment that he could potentially be charged with knowledge that the dirt and vegetation had not been fully removed when he traversed the crossing; but that exception has not been advanced by defendant and will not be addressed.

ii. Visibility was not Impaired

In support of its motion, defendant has presented the affidavit of an expert accident reconstructionist, Stephen Chewning, who reviewed photographs purportedly taken on the date of the subject accident, and states that when Baker's dump truck was located at the stop sign at the crossing, the "train was plainly visible, clear of any sight obstruction, and within hazard proximity of the crossing," such that Baker should have seen the train and yielded to the train.[11] *See* Miss. Code Ann. § 77-9-249 (setting forth duty of motorist to stop at crossing when train is approaching).

In response to defendant's motion, plaintiff points out that his experts have criticized Chewning's sight distance methodology and that there is otherwise substantial evidence that the crossing had inadequate sight distance. The court must agree. The fact is, questions as to whether and/or the extent to which

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[11] Chewning further states,

> [B]ased on my calculation of train speed and Plaintiff's vehicle positioning, when the Plaintiff's truck was located at the stop bar, the train was located 216 feet from the crossing, which is 17.5 feet clear of the tree line, south of the southernmost edge of the crossing.

He states that based on his personal observation of a freight train traveling northbound at the crossing,

> at approximately 216 feet, the train appeared huge, clear of the tree line, and dominated the sight distance picture.

visibility was compromised or obstructed at the crossing on the date and at the time of the incident cannot be resolved via summary judgment as the evidence on the issue is both voluminous and obviously contradictory.[12]

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[12] The Mississippi Supreme Court has recently reiterated that

> [o]rdinary care requires the railroad company to meet the unusual conditions of a railroad crossing with unusual precautions, particularly where the dangerous condition results from obstructions of view which prevent a traveler from seeing an approaching train until he is dangerously close to the track. *New Orleans & Northeastern R.R. Co. v. Lewis,* 214 Miss. 163, 172, 58 So. 2d 486, 489 (1952). The nature of the obstruction and whether one must come dangerously close to the crossing before being able to see the train are factual questions to be resolved by the finder of fact. *Badger v. Louisville & N.R. Co.,* 414 F.2d 880, 882-83 (5th Cir. 1969). . . . [I]t has been held that negligence claims against a railroad that permitted the view at a crossing to become obstructed by trees, bushes, weeds and grass were matters for the jury to decide when a vehicle operator would have to proceed to a point of peril upon or dangerously near the railroad company's tracks before obtaining an unimpeded view of a train at an appreciable distance. *Stacey v. Illinois Cent. R.R.,* 491 F.2d 542, 544 (5th Cir. 1974).

Illinois Cent. R. Co. v. Hawkins, 830 So. 2d 1162, 1170-1171 (Miss. 2002) (additional citations omitted).

The court notes that the parties' respective experts have offered conflicting testimony and opinions as to whether sight obstructions existed at the crossing which would have impaired visibility of the approaching train. Defendant has moved to exclude plaintiff's experts' testimony on this issue (and other issues). In the court's opinion, defendant's motion should be

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iii. Causation

Illinois Central argues, though, that even if there may have been inadequate sight distance at the crossing, Baker cannot establish that this proximately caused or contributed to the accident inasmuch as the proof shows that Baker never so much as bothered to slow, much less stop his truck, or to look to the right to make sure the way was clear before entering the crossing. For his part, Baker testified that he was unable to recall precisely what happened from the time he was told to move his loaded truck until his truck was hit by the train (though he did testify that it was his habit to stop and look).

The court would tend to agree that plaintiff's evidence of causation is weak, and that it may be difficult, if not ultimately impossible for plaintiff to prove that improved sight distance would have directly prevented the accident. The court is nevertheless hesitant to conclude that summary judgment is appropriate on this claim on this basis, particularly given that proof of inadequate sight distance is unquestionably relevant and will be admissible on the question whether the crossing was extra hazardous such that additional warnings were required.[13]

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denied and plaintiff's expert should be allowed to testify as to sight obstructions at the crossing.

[13] Moreover, even assuming Baker made no affirmative effort to ensure the way was clear before entering the crossing, that would not necessarily be fatal to his claim if the RWPR were found applicable. He may have been entitled to rely on the

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B. Extra Hazardous Crossing – Failure to Warn

1. A Railroad's Common Law Duty to Warn

It has long been recognized that "a railroad has the (common law) duty where its tracks cross a public highway to exercise caution commensurate with the situation to avoid collisions with travelers on the highway, by some sufficient means of warning travelers of the presence of the train on its tracks." *Illinois Cent. R. Co. v. Brashier,* 224 Miss. 588, 595, 80 So. 2d 739, 742 (Miss. 1955). In this vein, because by their very nature, all railroad crossings involve some degree of danger, railroads operating in Mississippi are required by statute to erect crossbucks at all public railroad crossings. *See* Miss. Code Ann. § 77-9-247. This is the minimum warning required to be given of the presence of a crossing. However, where the crossing is "extra hazardous," or "unusually dangerous," the mere presence of a crossbuck would not necessarily prevent a collision, and a greater warning may be needed. In *Donald v. Gulf, M. & O.R. Co.*, 220 Miss. 714, 718-719, 71 So. 2d 776, 777 (Miss. 1954), the court quoted 74 C.J.S., Railroads, § 711, p. 1306, where it was stated that "'[t]he test of whether a railroad crossing is unusually dangerous has been said to be the ability of the traveler to observe the approach of a train from the direction in which it is coming; * * * '." Thus, Mississippi cases have long

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railroad to provide him with specific protection at the crossing under the RWPR. In this vein, he did testify that he was accustomed on similar jobs to on-track safety being provided.

held that "if a crossing is unusually dangerous, ordinary care requires the railroad company to meet the peril with unusual precautions. . . ." *Id.* (quoting 44 Am. Jur., Railroads, Section 507, page 747).

In the case at bar, plaintiff and his experts have taken the position that the subject crossing was "extra hazardous" and that Illinois Central was thus negligent in failing to install additional warning devices at the crossing.[14] Defendant submits that plaintiff cannot prevail on this claim because as a matter of law, it had no right or duty to install additional warning devices inasmuch as that duty is placed under the exclusive jurisdiction of the Mississippi Department of Transportation pursuant to Mississippi Code Annotated § 65-1-75. In the court's opinion, defendant's position in this regard is without merit. Section 65-1-75 provides, in pertinent part,

> The jurisdiction of the Mississippi Department of Transportation shall be exclusive with respect to public roadway/railroad crossings either at grade or otherwise except to the extent that its jurisdiction is preempted by valid federal statute, regulation or order.
>
> . . .

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[14] Defendant has moved to exclude plaintiff's experts' testimony regarding their opinion that the crossing was extra hazardous and the reasons therefor. Those motions are addressed *infra*, pp. 26-36.

> The Mississippi Department of Transportation shall have power . . . to require the installation of adequate and appropriate luminous reflective warning signs, luminous flashing signals, crossing gates illuminated at night, or other warning devices in order to promote the health and safety of the public. Luminous flashing signals or crossing gate devices heretofore installed at grade crossings and those installations hereafter approved by the department shall be deemed adequate and appropriate. The department shall have authority to determine the number, type and location of such signs, signals, gates or other protective devices which shall conform as near as may be with generally recognized national standards, and the department shall have authority to prescribe the division of the cost of the installation and subsequent maintenance of such signs, signals, gates or other warning devices between the rail carrier or carriers, the public highway authority in interest and the Mississippi Department of Transportation.

According to defendant, its duties with respect to warning devices were fully discharged once the crossbucks were installed, and thereafter, any determination or decision that the subject crossing needed additional warning devices fell within the exclusive jurisdiction of the Department of Transportation, which has never made any determination that the crossing was extra hazardous.

While the statute does refer to the "exclusive" jurisdiction of the Department of Transportation, the court is of the opinion that the statute is properly interpreted as granting the Department exclusive jurisdiction vis-a-vis other state or local government authorities, not the railroads, and that it does not operate to relieve the railroad of its own common law duty to provide adequate warnings at crossings. *See Clark v. Illinois Cent. R. Co.,* 794 So. 2d 191, 196 (Miss. 2001) (recognizing railroad's common law duty to maintain safe crossing).

Similar arguments to that made by Illinois Central have been rejected by courts in numerous cases. For example, *Birmingham v. Union Pacific Railroad Company,* 971 F. Supp. 1282 (E.D. Ark. 1997), involved a state statute which granted the Arkansas State Highway Commission "exclusive jurisdiction over, the location and construction of new, and the improving and protecting of new and existing, street, road, and highway railroad crossings in Arkansas." Based on that statute, the railroad argued that the plaintiff's inadequate warning claims should be dismissed as superseded by the statute. The court concluded that the statute did not relieve the railroad company of its common-law duty to provide adequate warnings at abnormally dangerous railroad crossings. *Id.* at 1287.

The statute at issue in *Alcorn v. Union Pacific Railroad Company* granted the State Division of Motor Carrier and Railroad safety "exclusive power to determine and prescribe the manner, including the

particular point of crossing, and the terms of installation, operation, maintenance, apportionment of expenses, use and warning devices of each crossing of a public road, street or highway by a railroad or street railroad. . . ." 50 S.W.3d 226, 235 (Mo. 2001) (en banc). The court found no merit to the railroad's argument that the statute relieved it of any independent legal duty to evaluate a crossing to determine whether additional warning devices are needed, stating,

> Contrary to Union Pacific's reading, the "exclusive power" provision has traditionally been interpreted to "supplement, not repeal existing law." . . . Union Pacific reads "exclusive power" out of context to mean that the division alone – to the exclusion of all others, including the railroad – is vested with the authority to determine whether certain railroad crossing warnings are required. The "exclusive power" of the division of motor carrier and railroad safety is to the exclusion of authority that might otherwise be exercised by municipal, county, Missouri Department of Transportation, or other authorities. Read in context, the statute ensures that there are "minimum standards" in the construction of a crossing and a single regulatory source for construction standards and allocation of costs.

Id. at 234-35. The court observed that "[w]here the legislature intends to preempt a common law claim, it must do so clearly," *id.* at 235, and concluded that it

had not done so there, for "[n]othing in the statute negates the railroad's common law duty to use reasonable care in providing adequate warning of railroad crossings," *id. See also Smith v. Chesapeake & Ohio Ry. Co.,* 778 F.2d 384, 388 (7th Cir. 1985) (despite Indiana statute which granted "exclusive power" to public service commission to declare any crossing dangerous or extra hazardous and to require installation of additional safety devices, court held that railroad had duty to provide additional warning signals if warranted and could be found guilty of negligence if it failed to seek approval for placement of additional signals); *Shaup v. Frederickson,* 1998 WL 726650, *7 (E.D. Pa. 1998) (court observed that while state statute vested Public Utilities Commission with exclusive power to determine the manner in which crossings will be maintained, operated and protected in the interests of public safety, "nothing in the text refers to a railroad's independent common law duty to make the crossing safe for travelers"); *Schulz v. Chicago, M., St. P. & P. Ry. Co.,* 260 Wis. 541, 545, 51 N.W.2d 542, 545 (Wis. 1952) (stating that "[b]y giving the commission jurisdiction over the field the legislature did not abolish the common law duty of the railroad to take such additional precautions as the exercise of due care required until such time as the commission might exercise its jurisdiction over a particular crossing"); *cf. CSX Transp., Inc. v. Easterwood,* 507 U.S. at 665 n.5, 113 S. Ct. 1732 (opining in dictum with respect to Georgia law that "[w]hile final authority for the installation of particular safety devices at grade crossings has long rested with state

and local governments, . . . this allocation of authority apparently does not relieve the railroads of their duty to take all reasonable precautions to maintain grade crossing safety . . . including, for example, identifying and bringing to the attention of the relevant authorities dangers posed by particular crossings.").

2. Motion to Exclude Plaintiff's Experts

Expert testimony may properly be admitted as to the question whether a particular crossing is extra hazardous. *See Young v. Illinois Central Gulf R.R. Co.*, 618 F.2d 332, 337 (5th Cir. 1980) (finding error in trial court's exclusion of expert's opinion concerning dangerous condition of crossing). In *Illinois Central Railroad Co. v. White,* 610 So. 2d 308 (Miss. 1992), the court rejected an argument that the trial court had improperly admitted the testimony of two experts who had stated that a crossing was extra hazardous and given the reasons for that conclusion.

> In this case, the experts testified that the railroad crossing was extra hazardous (or dangerous) because of the proximity of the crossing to the curve and the trestle over the ravine. This is not the ultimate issue. The ultimate issue which the jury resolved was whether or not the railroad was negligent in not doing more to warn of its impending approach of trains at the White's crossing. The expert testimony that the crossing was "extra hazardous" merely assisted the trier of fact in this regard.

Id. at 319-320. In support of its conclusion, the court cited its earlier opinion in *Wilner v. Mississippi Export Railroad Co.*, 546 So. 2d 678 (Miss. 1989), in which expert opinion that a crossing was extra hazardous had also been admitted. In *Wilner,* however, the court made clear that

> [t]he opinion of the expert that the crossing was extra hazardous does not end the inquiry. Every railroad crossing can be extra hazardous, and is potentially dangerous. Motorists tend to forget it, but driving an automobile is potentially dangerous. Some would state that living is dangerous. The question is whether the defendant railroad, considering the danger of the crossing, should have in the exercise of reasonable care placed more or different warnings than it did?

Id. at 681-682.

James R. Loumiet, one of plaintiff's experts, has testified that the subject crossing was extra hazardous based on the following factors:

1. Use of the crossing by high speed trains and large trucks;

2. Sight obstructions at the crossing;

3. Significant volumes of train traffic;

4. Transport of hazardous materials through the crossing by rail;

5. Significant accident history; and

6. Lack of active warning devices at the crossing.

Another of plaintiff's experts, Edward Stanton, has also given his opinion that the crossing was extra hazardous given the significant accident history and sight obstructions at the crossing.[15]

Defendant has moved to exclude Loumiet's testimony, arguing that his opinion that the subject crossing was extra hazardous is not based upon relevant data, and therefore is unreliable under *Daubert* and hence inadmissible. Specifically, it contends that because Loumiet has essentially admitted that the factors upon which he based his conclusion that the crossing was extra hazardous did not cause or contribute to this particular accident, those factors are irrelevant, and his opinion based thereon is consequently unreliable.

In response, plaintiff denies that the factors cited by Loumiet did not play a causal role in the accident at issue, but submits that even if they were not

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[15] Stanton gave as an additional basis for his conclusion that the crossing was extra hazardous the fact that the roadway approach to the crossing was elevated. It is undisputed, however, that the approach was not elevated. Stanton's opinion in this regard was based on photographs which he evidently misperceived to show an elevation when none existed. Obviously, if he had testified that the crossing was extra hazardous for this reason alone, his testimony would not be admissible. His conclusion, though, was also based on other factors, and to that extent, is admissible. *See supra* note 12, and *infra* pp. 26-36.

causal factors in this specific collision, that would not undermine the relevance and reliability of Loumiet's testimony in the least, because, according to plaintiff, the factors Loumiet uses to determine whether a crossing is extra hazardous, and thus whether additional precautions should have been taken by defendant prior to the accident, "are relevant irrespective of whether any of those factors played a role in the actual collision." In this vein, Mr. Loumiet testified that in evaluating the crossing, he was

> looking at the operational conditions of the crossing prior to the accident . . . not the accident itself per se. . . . In other words, the circumstances of this accident don't determine whether this crossing was safe or not.

The courts that have addressed this issue have rather consistently recognized that "any 'condition' affecting the danger of a crossing may be considered . . . in determining whether the crossing is extrahazardous." *Crewdson v. Burlington Northern R. Co.*, 234 Neb. 631, 640, 452 N.W.2d 270, 279 (Neb. 1990). As one court put it, "[w]hether or not a crossing is extra hazardous depends upon its physical characteristics and conditions relating to the crossing itself. This includes anything which would obstruct visibility, heavy traffic which would pose an unusual problem, or similar circumstances." *Kuper v. Chicago and North Western Transp. Co.*, 290 N.W.2d 903, 907-908 (Iowa 1980). Countless cases have so held. *See, e.g., Smith v. Chesapeake & Ohio Ry. Co.*, 778 F.2d 384, 386-387 (7th Cir. 1985) (affirming charge to jury

which instructed that it could consider "all other circumstances concerning the crossing, such as obstructions to view, if any, the nature and gradation of the terrain immediately adjacent to the crossing, the angle at which the tracks intersect the highway, the time of day, the speed of the train, the near situation of trees, vegetation and the like, the curves in the track, and the frequency with which travelers pass over the crossing"); *Hostetler v. Consolidated Rail Corp.*, 123 F.3d 387, 393 (6th Cir. 1997) (relevant considerations in assessing what would constitute a reasonable and timely warning include such circumstances as "the amount and character of vehicular and other travel over the crossing, the extent and character of train movement, the control and speed of trains, and the character of the highway and the crossing itself"); *Crewdson,* 234 Neb. at 640, 452 N.W.2d at 278 (approving consideration of "the approaches to the crossing, the condition of the approaches, the obstructions, if any, to the view of the crossing to a traveler approaching the intersection, the amount of traffic using the crossing and all other relevant facts and circumstances which, in the exercise of ordinary care, would require active warning signals"). Indeed, the Mississippi Supreme Court has held, albeit in the context of a private crossing, that these same kinds of factors are properly considered in evaluating whether a crossing is extra hazardous. *See Illinois Central R.R. Co. v. White,* 610 So. 2d 308, 317 (Miss. 1992) (noting testimony concerning limited sight distance due to proximity of curve in the tracks

and heavy vegetation, and volume of train and vehicular traffic over the crossing).

From this, the court must conclude that defendant's objection to Loumiet's testimony on the basis that his conclusion takes into account conditions of the crossing that did not directly cause this particular accident is not well taken.[16] Of course, in addition to

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[16] The court notes, however, that Loumiet's explicit reliance on 23 C.F.R. § 646.214 as a basis for concluding the crossing was extra hazardous is problematic. That regulation provides in pertinent part as follows:

> (3)(i) Adequate warning devices, under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist:
>
> (A) Multiple main line railroad tracks.
>
> (B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.
>
> (C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.
>
> (D) A combination of high speeds and moderately high volumes of highway and railroad traffic.
>
> (E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of schoolbuses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.
>
> (F) A diagnostic team recommends them.

(Continued on following page)

proving that the crossing was extra hazardous, plaintiff must also prove that the warning provided by defendant in addition to the crossbuck – including the stop sign and the train's bell or whistle – did not constitute a reasonable warning on the occasion in question of the approach of the train, and he must show that the failure to provide a reasonable warning proximately caused or contributed to this collision.[17]

While the factors delineated in the regulation have been identified by courts as relevant to the inquiry whether a crossing is extra hazardous so as to give rise to a common law duty to provide enhanced warning of a crossing and/or train approach, the fact that the federal government mandates specific warning devices when any one of these conditions exists if federal funds are to be used at the crossing could be misleading and is for that reason potentially prejudicial. Thus, while Loumiet would not be foreclosed from testifying that these factors were considered, it may be appropriate to limit the extent of his testimony relating to this section. The court need not further consider at this time how to best address this potential prejudice.

[17] Most courts have held that testimony regarding prior accidents at a crossing is admissible to show, among other things, that a dangerous situation or condition exists, provided that "the former accidents happened under substantially the same circumstances as those existing at the time of the accident." *Mitcham v. Illinois Central Gulf R.R. Co.*, 515 So. 2d 852, 855-56 (Miss. 1987). Here, plaintiff has identified three prior accidents at the crossing from 1995 to the date of the collision. The parties dispute whether all of those accidents are sufficiently similar to be relevant. Defendant argues that in order for evidence of other accidents to be admissible, Baker must prove that such accidents involved an eastbound commercial vehicle and a northbound train at a time when the vegetation had been cleared in the southwest quadrant of the crossing. Obviously, there were no such accidents, since the vegetation was not

(Continued on following page)

3. Motion to Exclude Defendant's Experts

In a related vein, plaintiff has moved to exclude defendant's experts' opinions that the crossing was *not* extra hazardous because they have not demonstrated that they have the requisite qualifications to give opinions on this subject and because they have not demonstrated that they considered any of these relevant factors in arriving at their conclusions. In the court's view, having considered the parties' submissions, Chewning appears adequately qualified to provide his opinion on this issue, subject, of course, to cross examination as to the factors that inform his opinion as to the relative safety of the crossing. Defendant advises that it does not intend to offer "expert" opinion from McDonald regarding this issue, though it submits that he may properly offer lay testimony as to his impression whether the crossing could be safely traversed. It does not appear to the court that such testimony would be helpful to the jury, and should therefore not be permitted.[18]

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cleared until the date of the accident in issue. In the court's opinion, defendant's view as to what is required here is overly restrictive. Prior accidents at the crossing are relevant if they involved an eastbound vehicle and a northbound train during the daytime.

[18] For the same reason, the court is of the opinion that Chewning's proposed testimony that Baker could have heard the train whistle/bell from the cab of his truck on the occasion of the accident should not be allowed. Defendant concedes that Chewning cannot offer an expert opinion on this issue, and yet it

(Continued on following page)

Conclusion

Based on the foregoing, it is ordered that defendant's motion for summary judgment, or in the alternative, for partial summary judgment is denied; plaintiff's motion for partial summary judgment is denied; defendant's motion to exclude testimony of plaintiff's expert Edward Stanton is granted in part and denied in part, as set forth herein; defendant's motion to exclude the testimony of plaintiff's expert James R. Loumiet is denied; plaintiff's motion to exclude certain testimony from defendant's expert Mike McDonald is granted; and plaintiff's motion to exclude certain testimony from defendant's expert Stephen Chewning is granted in part and denied in part.[19]

SO ORDERED this 13th day of July, 2005.

/s/ Tom S. Lee
UNITED STATES
DISTRICT JUDGE

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proposes that he can offer lay testimony to that effect. The court concludes otherwise.

[19] The plaintiff has previously filed a motion in limine that is fully briefed, and in recent days, additional motions in limine have been filed by defendants, some of which cover much of the same grounds as the motions considered herein. Those motions obviously are not addressed herein.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CHARLES BAKER PLAINTIFF

vs. CIVIL NO. 3:03CV905LN

CANADIAN NATIONAL/
ILLINOIS CENTRAL
RAILWAY COMPANY DEFENDANT

TRIAL TRANSCRIPT
VOLUME

BEFORE THE HONORABLE TOM S. LEE,
UNITED STATES DISTRICT JUDGE
AND A JURY
NOVEMBER 14, 2005
JACKSON, MISSISSIPPI

APPEARANCES:

FOR THE PLAINTIFF:
MR. CHARLES W. ARMBRUSTER
MR. MICHAEL T. BLOTEVOGEL

FOR THE DEFENDANT:
MR. GEORGE H. RITTER
MR. CHARLES H. RUSSELL

REPORTED BY: CHERIE GALLASPY BOND
Registered Merit Reporter
Mississippi CSR #1012

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* * *

[26] THE COURT: Incidentally, gentlemen, it is not necessary even in order for you to stand when the jury comes in or leaves.

I'm going to rule now on the various motions that are pending. The plaintiff filed a motion in limine on April 8th and on July 11th, two days before the court entered the opinion on the defendant's summary judgment motions and the parties various Daubert motions, the defendant filed four motions in limine. The court's opinion covered most of these issued raised by the motion.

Shortly after the court issued its opinion, a motion to reconsider was filed by the defendant. I'm going to address first the defendant's motion to reconsider, amend and/or for clarification of certain aspects of the opinion.

Generally speaking, no new arguments are made in this [27] motion and all of the arguments were considered by court in ruling on the summary judgment motions. The court put a lot of thought and research into the ruling and any matters that are subject to the objections can be addressed on appeal.

I think the opinion was sufficiently clear on all points and no clarification is needed, but more specifically, the motion to reconsider seeks reconsideration on two points. The first one is that the defendant argues that contrary to the court's statement in the July 13th opinion, the defendant does not concede

that if the Roadway Worker Protection Rules were found to apply, they were violated. The court made that statement in a footnote. The defendant says it made no such concession and, in fact, presented proof that it did comply with the RWPR.

The defendant states, quotation marks, for example, the defendant offered the testimony of plaintiff's coworkers who yelled at him to stop his vehicle when they heard the train approaching. I seriously doubt that this would even arguably satisfy the railroad's duty under the rules, but the defendant also represents that it has additional evidence to introduce at trial to show that if the rules applied, they were not violated.

In view of this representation, the opinion is amended to reflect that the defendant does not concede that the Roadway Protection Rules were violated. Even though the plaintiff [28] insists that the rules were violated as the defendant took no safety precautions to prevent injury to plaintiff and his coworkers, the defendant should not be precluded from putting on its proof directly to this issue.

I denied summary judgment on it, and I will reserve ruling, but the facts as I understand them and from the representations of counsel indicate to me that there's a likelihood that the Roadway Protection Rules do apply in this case.

* * *

[31] The plaintiff also asked the court to reconsider its interpretation of the Roadway Protection Rules as inconsistent with the plain language of these rules. The court held that if Baker pulled into the public road and approached the intersection as any other motorist, then the rules would not apply. The plaintiff argues that the rules apply if the roadway worker, which Baker indisputably was, fouled the track and that in driving his truck across the track, Baker was clearly in foul of the track.

I'm denying the request to reconsider. I have made the comment, though, about what – and will wait to be sure about [32] the facts on the approach of the plaintiff to the track and whether he was in the roadway or not.

* * *

[632] MR. BLOTEVOGEL: The plaintiff moves for judgment as a matter of law on the Roadway Worker Protection Rules issue and now, of course, we have taken the position that we believe the standard that you have set is an erroneous interpretation. However, we believe even under the standard you have established, it has been conclusively proven that Charles Baker, Sr., did not and could not approach that crossing like an ordinary motorist.

The testimony has clearly established that he pulled away from a dirt road that was next to the crossing. The [633] evidence – no ordinary motorist is going to have to take an approach from the dirt construction road next to the crossing. He was driving

a 50-foot truck loaded with dirt, again, not something an ordinary motorist would do. His approach, as best we can determine, is approximately 30 to 40 feet. Now, that's important because when he starts his approach, the train is behind him. A motorist might be approaching on Billy Bell Road with the train behind him, but the difference is that motorist is on a paved road 80 feet from the crossing, 80 feet from the tracks. Charles Baker is 30 or 40 feet at the most from the tracks on a dirt road.

As you've heard from Mr. Baker, Sr., and his son; and from the analysis of James Loumiet, he had very limited maneuvering ability, which is not a problem encountered by an ordinary motorist. If – you can look at Defendant's Exhibit 8, which is the wreckage photo, you can determine that at the moment of impact, he had just gotten the last wheel of his vehicle on to the public road. No motorist encountered that situation.

Finally, even if you give the railroad the benefit of the doubt on the testimony, the testimony at most shows that he is at a 90-degree angle at the crossing right at the point he gets to the stop line. As you can tell, a motorist who's approaching from Billy Bell Road has an entire 85-foot approach wherein they are going to be perpendicular next to that crossing.

[634] Charles Baker was not – did not have the approach of an ordinary motorist. He faced extraordinary hazards as he approached the crossing and, therefore, under your standard, the Roadway Worker

Protection Rules clearly applied. I think the evidence is uncontroverted that the railroad did not provide any of the protections required by these rules. Mr. James Loumiet stated that flagmen would have prevented this collision and that the absence of flagmen was a cause of the collision.

Now, a second related issue is the common law duty to provide a flagman. Mr. Edward Stanton gave testimony that every class 1 railroad he ever worked with when he worked for a contracting company for more than 20 years always hired a flagman and did additional protections for the work crew even if the work did not require the crew to go on to the track, and the only reason the crew would be on the track was when they were traversing the public crossing.

He said that it was unreasonable for the railroad not to provide protections and that that failure to provide protections made the situation for more dangerous for Mr. Baker. Again, James Loumiet testified a flagman would have prevented the collision. The absence of a flagman was the cause of a collision. There was not a single witness who sat in that chair who gave any explanations as to why it was reasonable for the railroad not to provide a flagman.

[635] For these reasons – and finally, on the issue of contributory negligence, now clearly, if you give the benefit of the doubt to the railroad's evidence, they have testimony indicating that Mr. Baker did not stop at the stop sign. What they do not have is anyone who

can actually tell you what Mr. Baker's view would have been at the moment he reached the stop line where he was supposed to stop and what his view would have been at that time. In other word, there has not been any evidence that anyone actually has my knowledge regarding causation.

Certainly there are people who have given their opinions, but there's no indication they are actually qualified to render those opinions. So, therefore, I believe we are entitled to judgment as a matter of law under the Roadway Worker Protection Rules, on the railroad's common law duty to provide a flagman, and on contributory negligence because of the causation issue.

THE COURT: All right. The motion is denied. I'll hear from – the defendant's motion.

MOTION FOR DIRECTED VERDICT
ON BEHALF OF DEFENDANT

MR. RITTER: Thank you, Your Honor. First of all, for the record, on page 9, items number 9 and 10 of the pretrial order specifically state that the issues of fact concerning whether Red Hancock Construction properly trained and/or instructed the plaintiff and also whether Red Hancock Construction failed to provide a watchman at the crossing and [636] if so, whether that failure caused or contributed to the accident. I wanted to make that record.

MOTION FOR DIRECTED VERDICT
ON BEHALF OF PLAINTIFF

The defendant moves for judgment as a matter of law for the following grounds: Number one, the plaintiff has failed to prove a violation of the Roadway Worker Protection regulations. The plaintiff has failed to establish that he was a roadway worker within the definition of those – of those regulations and failed to establish that he – his work until he was even with the stop sign and is undisputed that he was squared up at that time created a potential for him to foul the tracks. Therefore, there's been no violation of the regulations.

* * *

[638] THE COURT: All right, sir. The motion or motions are overruled.

* * *

[640] MR. BLOTEVOGEL: Item number 10 is the Roadway Worker Protection Rules.

THE COURT: Page 10?

MR. BLOTEVOGEL: Page 10, yes.

THE COURT: All right.

MR. BLOTEVOGEL: Many of our objections have been noted already. I will try to state succinctly –

THE COURT: You mean in your argument with regard to [641] the motion? What you said in the conference is not recorded.

MR. BLOTEVOGEL: Correct. These arguments were not referenced in the motion for judgment on the pleadings. These arguments have been referenced in our motion for partial summary judgment and pleadings related thereto. Our position on the instructions specifically is that if you're going to instruct the jury regarding the Roadway Worker Protection Rules, the instructions should define the terms straight out of those federal regulations, and any additional materials should not – any additional instructions should not be permitted unless there is some indication that is the interpretation the agency itself would give.

And I will note for the record that when the Federal Railroad Administration issued these rules in December 16th of 1996, in the Federal Register for that date on page starting 65959 and specifically on 65962, the FRA rejected the interpretation suggested in the court's instructions, and I will certainly not read all of the relevant material, but it states, "The term 'roadway worker' was intended to describe employees who are covered and not to describe when this coverage begins and ends."

THE COURT: All right, sir.

* * *

[647] THE COURT: The request is refused. anything further now? Okay. Let's get the jury. The plaintiff's special verdict form is regarded as having been submitted and refused and will go in the record as refused.

* * *

[654] There are certain federal regulations which require that a railroad company in order to protect employees working along a railroad from the hazards of being struck by a train or other on-track equipment provide on-track safety to roadway workers whose work for the railroad requires that such workers foul the tracks. A question is presented in this case as to whether the defendant railroad had a duty to provide such on-track safety to the plaintiff.

As a member of the crew hired to perform work on the railroad's right-of-way, the plaintiff and other members of the Hancock crew were roadway workers. What you must decide is whether Mr. Baker's work required him to foul the tracks. For only if that is the case was the railroad required to provide on-track safety for his protection.

[655] Fouling a track is defined as the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment or in any case, is within four feet of the field side of the near running rail.

On-track safety can include a flagman whose sole job it is to become aware of and to provide sufficient advanced warning to workers of approaching trains. When a roadway worker such as the plaintiff has left the work site and is traveling on a public highway and approaching a public railroad crossing with the same opportunity as other motorists to see and comprehend the crossing, he is at that point treated as any other member of the motoring public and is no longer in need of the special protections afforded to him in his capacity as a roadway worker.

If you find from a preponderance of the evidence in this case that the plaintiff was able to pull onto the public highway from the right-of-way so that he could approach and see the crossing from the same perspective as other drivers on the highway, then the railroad had no duty under the law to provide on-track safety and cannot be found negligent on this basis.

If you find from a preponderance of the evidence in this case that the plaintiff was unable to pull onto the public highway from the right-of-way so that he could approach and see the crossing from the same perspective as other drivers on the [656] highway, then the railroad had a duty under the regulations to provide on-track safety.

If you further find from a preponderance of the evidence that the defendant by some act or failure to act violated the law by failing to provide on-track safety as prescribed by the regulations, then the railroad is presumed to be negligent.

This presumption of negligence is not conclusive, however, and may be overcome or outweighed by evidence in this case satisfying your minds that he defendant railroad acted as a reasonably prudent person would have acted under all the surrounding circumstances shown by the evidence in this case.

You may not find for the plaintiff on this claim unless you also find that such negligence, if any, proximately caused or contributed to the subject accident.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CHARLES BAKER	PLAINTIFF
VS.	CIVIL ACTION NO. 3:03CV905LN
ILLINOIS CENTRAL RAILWAY COMPANY	DEFENDANT

SPECIAL VERDICT FORM

(Filed Nov. 18, 2005)

Plaintiff's Claim that Defendant Violated Federal Regulations:

1. Do you find from a preponderance of the evidence that the plaintiff Charles Baker's work at the time of the subject collision required him to "foul the tracks" as that concept has been explained in the court's instructions?

____ Yes _X_ No

If your answer is "No," proceed to Number 5.

If your answer is "Yes," proceed to Number 2.

2. Do you find from a preponderance of the evidence that Illinois Central Railway Company violated the specific federal regulations requiring that it provide "on-track safety" to roadway workers?

____ Yes ____ No

If your answer is "No," proceed to Number 5.

If your answer is "Yes," proceed to Number 3.

3. Do you find from a preponderance of the evidence that Illinois Central's violation of these regulations constituted negligence on its part?

____ Yes ____ No

If your answer is "No," proceed to Number 5.

If your answer is "Yes," proceed to Number 4.

4. Do you find from a preponderance of the evidence that such negligence proximately caused or contributed to the subject collision?

____ Yes ____ No

5. If your answer to ***any*** of questions 1 through 4 is "No," then your verdict is for the defendant Illinois Central Railway Company on plaintiff Charles Baker's claim based on alleged violation of federal regulations relating to on-track safety.

If your answer to ***each*** of questions 1 through 4 is "Yes," then your verdict is for the plaintiff Charles Baker and against Illinois Central on this claim.

Proceed to Number 6.

Plaintiff's Claim that Defendant Failed to Take Adequate Measures at the Crossing

6. Do you find from a preponderance of the evidence that the Greens Road crossing was extra hazardous or unusually dangerous?

____ Yes _X_ No

If your answer is "No," proceed to Number 9.

If your answer is "Yes," proceed to Number 7.

7. Do you find from a preponderance of the evidence that in the exercise of reasonable care, the defendant Illinois Central should have taken additional warning measures at the Green's Road crossing?

____ Yes ____ No

If your answer is "No," proceed to Number 9.

If your answer is "Yes," proceed to Number 8.

8. Do you find from a preponderance of the evidence that the defendant Illinois Central's failure to install additional warning devices at the crossing proximately caused or contributed to the subject collision?

____ Yes ____ No

9. If your answer to ***any*** of questions 6 through 8 is "No," then your verdict is for the defendant Illinois Central Railway Company on plaintiff Charles Baker's claim based on alleged failure to provide adequate warning devices at the crossing.

If your answer to ***each*** of questions 6 through 8 is "Yes," then your verdict is for the plaintiff Charles Baker and against Illinois Central on this claim.

Proceed to Number 10.

Plaintiff's Claim Based on Failure to Control Vegetation

10. Do you find from a preponderance of the evidence that the defendant Illinois Central failed to keep the subject right of way clear of vegetation that would unreasonably and dangerously restrict motorists' ability to see an approaching train?

____ Yes ___X__ No

If your answer is "No," proceed to Number 12.

If your answer is "Yes," proceed to Number 11.

11. Do you find from a preponderance of the evidence that the defendant Illinois Central's negligence in failing to keep a [its] right of way clear of vegetation proximately caused or contributed to the subject collision?

____ Yes ____ No

12. If your answer to ***either*** questions 10 or 11 is "No," then your verdict is for the defendant Illinois Central Railway Company on plaintiff Charles Baker's claim based on alleged failure to keep its right of way clear of excessive vegetation.

If your answer to ***both*** questions 10 and 11 is "Yes," then your verdict is for the plaintiff Charles Baker and against Illinois Central on this claim.

Proceed to Number 13:

13. If you have found in favor of the defendant on each of plaintiff's claims, then your verdict is for

the defendant Illinois Central and you need proceed no further.

If you have found in favor of the plaintiff on any of his claims against the defendant, answer the following questions:

14. Do you find from a preponderance of the evidence that Charles Baker was negligent and that his negligence proximately contributed to the collision?

____ Yes ____ No

If your answer is "No," proceed to Number 16.

If your answer is "Yes," proceed to Number 15.

15. Indicate the percentages of fault you find to be attributable to the plaintiff and to the defendant, understanding that the combined total must equal 100%:

____ Illinois Central

____ Charles Baker

Proceed to Number 16.

16. What is [the] total amount of damages you find to have been sustained by the plaintiff as a proximate result of the subject collision?

$ _____.

This the 17th day of November, 2005.

/s/ Paul R. Picard
FOREPERSON

/s/ Michelle Jones

/s/ James Taylor

/s/ Mary Lou Ballard

/s/ William Scott

/s/ Linda Sue Jackson

/s/ Kathy Willis

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI JACKSON DIVISION

CHARLES BAKER	**PLAINTIFF**
VERSUS	**CAUSE NO..: 3:03CV905LN**
CANADIAN NATIONAL ILLINOIS CENTRAL	**DEFENDANT**

FINAL JUDGMENT ON JURY VERDICT

(Filed Nov. 18, 2005)

This cause came on for trial on the claims of Plaintiff Charles Baker against Defendant Illinois Central Railroad Company, the Honorable Tom S. Lee, presiding, beginning November 14, 2005, and a jury of seven (7) good and lawful citizens of the Souther [sic] District of Mississippi, Jackson Division, including, Paul R. Picard, having been duly impaneled and accepted by the parties, and sworn according to law to try the issues, and the Plaintiff and his attorneys and the Defendant and its attorneys being present, and the jury having heard the testimony of witnesses and all of the evidence introduced during the trial and arguments of counsel and instructions of the Court, retired to consider their verdict and presently returned into open Court on November 17, 2005, their verdict which was examined and accepted by the Court, with the jury being polled, and the verdict by Special Verdict form being:

Plaintiff's Claim that Defendant Violated Federal Regulations:

"1. Do you find from a preponderance of the evidence that the plaintiff Charles Baker's work at the time of the subject collision required him to "foul the tracks" as that concept has been explained in the court's instructions? Answer: No.

* * *

Plaintiff's claim that Defendant Failed to Provide Adequate Warning Devices at the Crossing

6. Do you find from a preponderance of the evidence that the Greens Road Crossing was extra hazardous or unusually dangerous? Answer: No.

* * *

Plaintiff's Claim Based on Failure to Control Vegetation

10. Do you find from a preponderance of the evidence that the defendant Illinois Central failed to keep the subject right of way clear of vegetation that would unreasonably and dangerously restrict motorists' ability to see an approaching train? Answer: No."

IT IS THEREFORE ORDERED that final judgment be and same is hereby entered in favor of Defendant Illinois Central Railroad Company on all claims of Plaintiff Charles Baker and that Plaintiff

shall take and recover nothing of or from Defendant, with all costs assessed against the Plaintiff.

SO ORDERED AND ADJUDGED this the 18th day of November, 2005.

/s/ Tom S. Lee
DISTRICT COURT JUDGE

PRESENTED BY:

/s/ George H. Ritter
GEORGE H. RITTER (MSB #5372)
WISE CARTER CHILD & CARAWAY
600 Heritage Building
Congress at Capitol
Post Office Box 651
Jackson, Mississippi 39205
Telephone: (601) 968-5500

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CHARLES BAKER — PLAINTIFF

VS. — CIVIL ACTION NO. 3:03CV905LN

CANADIAN NATIONAL
ILLINOIS CENTRAL RAILROAD — DEFENDANT

ORDER

Before the court for consideration is the motion of plaintiff for judgment as a matter of law on certain issues and for new trial on remaining issues or, in the alternative, new trial on all issues. The court has considered the motion with supporting briefs and defendant's response to the motion and finds that the motion should be denied.

Accordingly, IT IS ORDERED that plaintiff's motion is denied.

ORDERED this 12th day of January, 2006.

/s/ TOM S. LEE
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 06-60138

CHARLES E BAKER

Plaintiff-Appellant

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD

Defendant-Appellee

Appeal from the United States District Court for the Southern District of Mississippi, Jackson

---

ON PETITION FOR REHEARING

(Filed Aug. 15, 2008)

Before HIGGINBOTHAM, SMITH, and OWEN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Priscilla R. Owen
United States Circuit Judge

TITLE 49 – TRANSPORTATION

CHAPTER II – FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 214_RAILROAD WORKPLACE SAFETY – Table of Contents

Subpart A_General

Sec. 214.7 Definitions.

Adjacent tracks mean two or more tracks with track centers spaced less than 25 feet apart.

* * *

Controlled track means track upon which the railroad's operating rules require that all movements of trains must be authorized by a train dispatcher or a control operator.

* * *

Definite train location means a system for establishing on-track safety by providing roadway workers with information about the earliest possible time that approaching trains may pass specific locations as prescribed in § 214.331 of this part.

Designated official means any person(s) designated by the employer to receive notification of noncomplying conditions on on-track roadway maintenance machines and hi-rail vehicles.

* * *

Employee means an individual who is engaged or compensated by a railroad or by a contractor to a railroad to perform any of the duties defined in this part.

Employer means a railroad, or a contractor to a railroad, that directly engages or compensates individuals to perform any of the duties defined in this part.

Equivalent means alternative designs, materials, or methods that the railroad or railroad contractor can demonstrate will provide equal or greater safety for employees than the means specified in this part.

Exclusive track occupancy means a method of establishing working limits on controlled track in which movement authority of trains and other equipment is withheld by the train dispatcher or control operator, or restricted by flagmen, as prescribed in § 214.321 of this part.

Flagman when used in relation to roadway worker safety means an employee designated by the railroad to direct or restrict the movement of trains past a point on a track to provide on-track safety for roadway workers, while engaged solely in performing that function.

Foul time is a method of establishing working limits on controlled track in which a roadway worker is notified by the train dispatcher or control operator that no trains will operate within a specific segment of controlled track until the roadway worker reports

clear of the track, as prescribed in § 214.323 of this part.

Fouling a track means the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field side of the near running rail.

* * *

Hi-rail vehicle means a roadway maintenance machine that is manufactured to meet Federal Motor Vehicle Safety Standards and is equipped with retractable flanged wheels so that the vehicle may travel over the highway or on railroad tracks.

Hi-rail vehicle, new means a hi-rail vehicle that is ordered after December 26, 2003 or completed after September 27, 2004.

Inaccessible track means a method of establishing working limits on non-controlled track by physically preventing entry and movement of trains and equipment.

Individual train detection means a procedure by which a lone worker acquires on-track safety by seeing approaching trains and leaving the track before they arrive and which may be used only under circumstances strictly defined in this part.

Informational line-up of trains means information provided in a prescribed format to a roadway

worker by the train dispatcher regarding movements of trains authorized or expected on a specific segment of track during a specific period of time.

* * *

Non-controlled track means track upon which trains are permitted by railroad rule or special instruction to move without receiving authorization from a train dispatcher or control operator.

On-track roadway maintenance machine means a self-propelled, rail-mounted, non-highway, maintenance machine whose light weight is in excess of 7,500 pounds, and whose purpose is not for the inspection of railroad track.

On-track roadway maintenance machine, existing means any on-track roadway maintenance machine that does not meet the definition of a "new on-track roadway maintenance machine."

On-track roadway maintenance machine, new means an on-track roadway maintenance machine that is ordered after December 26, 2003, and completed after September 27, 2004.

On-track safety means a state of freedom from the danger of being struck by a moving railroad train or other railroad equipment, provided by operating and safety rules that govern track occupancy by personnel, trains and on-track equipment.

* * *

Qualified means a status attained by an employee who has successfully completed any required training for, has demonstrated proficiency in, and has been authorized by the employer to perform the duties of a particular position or function.

Railroad means all forms of non-highway ground transportation that run on rails or electro-magnetic guideways, including (1) commuter or other short-haul rail passenger service in a metropolitan or suburban area, and (2) high-speed ground transportation systems that connect metropolitan areas, without regard to whether they use new technologies not associated with traditional railroads. Such term does not include rapid transit operations within an urban area that are not connected to the general railroad system of transportation.

Railroad bridge means a structure supporting one or more railroad tracks above land or water with a span length of 12 feet or more measured along the track centerline. This term applies to the entire structure between the faces of the backwalls of abutments or equivalent components, regardless of the number of spans, and includes all such structures, whether of timber, stone, concrete, metal, or any combination thereof.

Railroad bridge worker or bridge worker means any employee of, or employee of a contractor of, a railroad owning or responsible for the construction, inspection, testing, or maintenance of a bridge whose assigned duties, if performed on the bridge, include

inspection, testing, maintenance, repair, construction, or reconstruction of the track, bridge structural members, operating mechanisms and water traffic control systems, or signal, communication, or train control systems integral to that bridge.

Restricted speed means a speed that will permit a train or other equipment to stop within one-half the range of vision of the person operating the train or other equipment, but not exceeding 20 miles per hour, unless further restricted by the operating rules of the railroad.

Roadway maintenance machine means a device powered by any means of energy other than hand power which is being used on or near railroad track for maintenance, repair, construction or inspection of track, bridges, roadway, signal, communications, or electric traction systems. Roadway maintenance machines may have road or rail wheels or may be stationary.

Roadway work group means two or more roadway workers organized to work together on a common task.

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a

track, and flagmen and watchmen/lookouts as defined in this section.

* * *

Train approach warning means a method of establishing on-track safety by warning roadway workers of the approach of trains in ample time for them to move to or remain in a place of safety in accordance with the requirements of this part.

Train coordination means a method of establishing working limits on track upon which a train holds exclusive authority to move whereby the crew of that train yields that authority to a roadway worker.

Train dispatcher means the railroad employee assigned to control and issue orders governing the movement of trains on a specific segment of railroad track in accordance with the operating rules of the railroad that apply to that segment of track.

Watchman/lookout means an employee who has been annually trained and qualified to provide warning to roadway workers of approaching trains or on-track equipment. Watchmen/lookouts shall be properly equipped to provide visual and auditory warning such as whistle, air horn, white disk, red flag, lantern, fusee. A watchman/lookout's sole duty is to look out for approaching trains/on-track equipment and provide at least fifteen seconds advanced warning to employees before arrival of trains/on-track equipment.

Working limits means a segment of track with definite boundaries established in accordance with this part upon which trains and engines may move only as authorized by the roadway worker having control over that defined segment of track. Working limits may be established through "exclusive track occupancy," "inaccessible track," "foul time" or "train coordination" as defined herein.

TITLE 49 – TRANSPORTATION

CHAPTER II – FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 214 – RAILROAD WORKPLACE SAFETY – Table of Contents

Subpart C – Roadway Worker Protection

Sec. 214.301 Purpose and scope.

Source: 61 FR 65976, Dec. 16, 1996, unless otherwise noted.

(a) The purpose of this subpart is to prevent accidents and casualties caused by moving railroad cars, locomotives or roadway maintenance machines striking roadway workers or roadway maintenance machines.

(b) This subpart prescribes minimum safety standards for roadway workers. Each railroad and railroad contractor may prescribe additional or more

stringent operating rules, safety rules, and other special instructions that are consistent with this subpart.

(c) This subpart prescribes safety standards related to the movement of roadway maintenance machines where such movements affect the safety of roadway workers. This subpart does not otherwise affect movements of roadway maintenance machines that are conducted under the authority of a train dispatcher, a control operator, or the operating rules of the railroad.

TITLE 49 – TRANSPORTATION

CHAPTER II – FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 214 – RAILROAD WORKPLACE SAFETY – Table of Contents

Subpart C – Roadway Worker Protection

Sec. 214.303 Railroad on-track safety programs, generally.

(a) Each railroad to which this part applies shall adopt and implement a program that will afford on-track safety to all roadway workers whose duties are performed on that railroad. Each such program shall provide for the levels of protection specified in this subpart.

(b) Each on-track safety program adopted to comply with this part shall include procedures to be used by each railroad for monitoring effectiveness of and compliance with the program.

TITLE 49 – TRANSPORTATION

CHAPTER II – FEDERAL RAILROAD ADMINISTRATION, DEPARTMENT OF TRANSPORTATION

PART 214 – RAILROAD WORKPLACE SAFETY – Table of Contents

Subpart C – Roadway Worker Protection

Sec. 214.335 On-track safety procedures for roadway work groups.

(a) No employer subject to the provisions of this part shall require or permit a roadway worker who is a member of a roadway work group to foul a track unless on-track safety is provided by either working limits, train approach warning, or definite train location in accordance with the applicable provisions of §§ 214.319, 214.321, 213.323, 214.325, 214.327, 214.329 and 214.331 of this part.

(b) No roadway worker who is a member of a roadway work group shall foul a track without having been informed by the roadway worker responsible for the on-track safety of the roadway work group that on-track safety is provided.

(c) Roadway work groups engaged in large-scale maintenance or construction shall be provided with train approach warning in accordance with § 214.327 for movements on adjacent tracks that are not included within working limits.

Federal Railroad Administration

49 CFR 214

[FRA Docket No. RSOR 13, Notice No. 9]

RIN 2130-AA86

Roadway Worker Protection

AGENCY: Federal Railroad Administration (FRA), Department of Transportation (DOT).

ACTION: Final rule.

SUMMARY: FRA is issuing rules for the protection of railroad employees working on or near railroad tracks. This regulation requires that each railroad devise and adopt a program of on-track safety to provide employees working along the railroad with protection from the hazards of being struck by a train or other on-track equipment. Elements of this on-track safety program include an on-track safety manual; a clear delineation of employers' responsibilities for providing on track safety, as well as employees' rights and responsibilities related thereto; well defined procedures for communication and protection; and annual on-track safety training. The program adopted by each railroad would be subject to review and approval by FRA.

DATES: *Effective Dates:* This rule is effective January 15, 1997.

Compliance Dates: Each railroad must notify the FRA not less than 30 days before their respective date

for compliance. Each railroad must be in compliance with this rule no later than the date specified in the following schedule: For each Class I railroad (including National Railroad Passenger Corporation) and each railroad providing commuter service in a metropolitan or suburban area, March 15, 1997; For each Class II railroad, April 15, 1997; For each Class III railroad, switching and terminal railroad, and any railroad not otherwise classified, May 15, 1997; For each railroad commencing operations after the pertinent date specified in this paragraph, the date on which operations commence.

FOR FURTHER INFORMATION CONTACT: Gordon A. Davids, P.E., Bridge Engineer, Office of Safety, FRA, 400 Seventh Street SW., Washington, DC 20590 (telephone: 202-632-3340); Phil Olekszyk, Deputy Associate Administrator for Safety Compliance and Program Implementation, FRA, 400 Seventh Street SW., Washington, DC 20590 (telephone: 202-632-3307); or Cynthia Walters, Trial Attorney, Office of Chief Counsel, FRA, 400 Seventh Street SW., Washington, DC 20590 (telephone: 202-632-3188).

SUPPLEMENTARY INFORMATION:

Introduction

Background

Concern regarding hazards faced by roadway workers has existed for many years. The FRA received a petition to amend its track safety standards from the Brotherhood of Maintenance of Way

Employees (BMWE) in 1990, which included issues pertaining to the hazards faced by roadway workers. This proceeding, however, formally originated with the Rail Safety Enforcement and Review Act, Public Law No. 102-365, 106 Stat. 972, enacted September 3, 1992, which required FRA to review its track safety standards and revise them based on information derived from that review. FRA issued an Advanced Notice of Proposed Rulemaking (ANPRM) on November 16, 1992 (57 FR 54038) announcing the opening of a proceeding to amend the Federal Track Safety Standards.

Workshops were held in conjunction with this effort, to solicit the views of the railroad industry and representatives of railroad employees on the need for substantive change in the track regulations. A workshop held on March 31, 1993 in Washington, D.C., specifically addressed the protection of employees from the hazards of moving trains and equipment. The subject of injury and death to roadway workers was of such great concern that FRA received petitions for emergency orders and requests for rulemaking from both the Brotherhood of Maintenance-of-Way Employees and the Brotherhood of Railroad Signalmen. FRA did not grant the petitions for emergency orders, but instead initiated a separate proceeding to consider regulations to eliminate hazards faced by these employees. FRA removed this issue from the track standards docket, FRA Docket No. RST-90-1 and established a new docket, FRA Docket No. RSOR

13, specifically to address hazards to roadway workers to expedite the effective resolution of this issue.

FRA also determined that standards addressing this issue would be more closely related to workplace safety than to standards addressing the condition of railroad track. Since Railroad Workplace Safety is addressed in 49 CFR Part 214, standards issued for the protection of roadway workers would be better categorized in this section, than Part 213, Track Safety Standards. Accordingly, the minimum standards proposed in this notice would amend Part 214 of Title 49, Code of Federal Regulations by adding a new subpart, Subpart C, addressing hazards to roadway workers.

FRA convened a Safety Summit Meeting on June 3, 1994 with affected railroad industry, contractor, and labor representatives. This meeting considered certain aspects of FRA accident data involving roadway workers. The meeting also facilitated a discussion of various short-term and long-term actions that could be taken by FRA and the industry to prevent injuries and deaths among roadway workers. One long-range alternative suggested by FRA was to use the negotiated rulemaking process to allow input from both railroad management and labor to develop standards addressing this risk. The agency determined that this was an appropriate subject for a negotiated rulemaking, and initiated this process.

* * *

Definition of Roadway Worker

Several commenters suggested the definition of roadway worker be reworded to refer to a worker "whose duties include and who is engaged in" to clarify that the rule applies to workers performing their roadway workers tasks. This suggestion essentially adds the qualifier "who is engaged in" to the definition that appeared in the NPRM. FRA believes that this qualifier would limit application of the rule due to the difficulty in determining when a worker becomes engaged in a task. In addition, the Advisory Committee determined that the term roadway workers was intended to describe employees who are covered and not to describe when this coverage begins and ends. Other provisions of the regulation enumerate the instances in which a worker must have some form of on-track safety and which methods are permissible. Neither the committee nor FRA was persuaded that this addition to the definition would be useful.

* * *

[LOGO] **Memorandum**

U.S. Department
of Transportation

**Federal Railroad
Administration**

Date: January 10, 2005 Reply to Attn of: G-05-21

Subject: Roadway Worker Protection Technical Bulletin Other than maintenance of way crafts performing duties

From: [/s/ Edward Pritchard]
Edward W. Pritchard
Director, Office of Safety Assurance and Compliance

To: Regional Administrators
Deputy Regional Administrators
Track Supervisory Specialists
Signal and Train Control Supervisory Specialists
Operating Practices Supervisory Specialists

There is an on-going question with respect to other crafts who may be performing peripheral activities similar to engineering activities. For example, a train crew/hostler cleaning a switch during a train movement or a mechanical employee performing light building maintenance in a shop under blue signal protection.

The definition of a "Roadway Worker" means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway,

signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section. The Advisory Committee determined that the term roadway worker was intended to describe employees who are covered and not to describe when this coverage begins and ends. 61 FR 65962.

The question arises whether an individual normally not assigned to conduct roadway worker activities, but occasionally engaging in such duties is subject to the rule. If the work to be performed is included within the definition of roadway worker, the employee performing such work must do so in compliance with the roadway worker regulation.

This bulletin is based on consultation with FRA's Office of Chief Counsel. Anyone desiring a formal legal interpretation on any issues discussed in this bulletin should contact that office.

* * *

[Pictures Omitted In Printing]

http://www.contractororientation.com/main/cn/canadianrailfullcourse.htm

On-Track Safety

The contractor is responsible for compliance with the Federal Railroad Administration's Roadway Worker Protection regulations (49CFR214, Subpart C) *CNs On Track Safety Link*

Under 49CFR214, Subpart C, railroad contractors are responsible for the training of their employees on these regulations.

In addition to the instructions contained in Roadway Worker Protection regulations, all contractor employees must:

- Maintain a distance of at least 25 feet or 8(M) to any track unless the railroad's EIC is present to authorize movements. The railroad's EIC will determine and provide the type of On-Track Safety that is required for the work being performed.
- Wearing of PPE is mandatory at ***ALL*** times when working on CN property.
- Participate in a job briefing during which the railroad's EIC will specify the type of On-Track Safety for the type of work being performed. Contractors must take special note of limits of track

authority, which tracks may or may not be fouled, and clearing the track. They will also receive special instructions relating to the work zones around machines and minimum distances between machines while working and traveling.

* * *

[http://www.csx.com/?fuseaction=about.property_corridor_safety]

CSXT Fiber Optic Program Safety Requirements

* * *

- All personnel must wear proper Personal Protection Equipment, which includes a minimum of hard hat, safety glasses, steel toed shoes, hearing protection, and orange vests with reflective stripes on or around road crossings. If not wearing orange hard hats, personnel must also wear orange vests regardless of location. **When working beyond 25 feet from the nearest rail of a main track, hard hats, safety glasses, and laced work boots will be required.**

* * *

Working On Or Around Tracks

- All work in the FRA Red Zone (within 4 feet from outside rail on each side of the track) will be done only with a CSXT, FRA qualified flagman or watchman as specified by the local Engineering representative.
- All work beyond 4 feet from the outside rails and within 25 feet, must be done under the supervision of a qualified inspector or CSXT flagman.
- Certain types of work done beyond 25 feet from the outside of the rails, and with equipment that will not reach beyond this point, may be done without flagging protection or a watchman, if approved by the local Engineering representative, and protected by a construction fence, if work is stationary (will not be used for cat plowing).

- All work must be stopped while trains are passing within the work zone.
- All workers will remain off the tracks. If necessary to perform the work on track, protection will be provided as stated above.

ANY VIOLATION OF ANY CSXT SAFETY RULES OR POLICY, MAY RESULT IN REMOVAL OF CONTRACTOR OR PERSONNEL FROM THE RIGHT OF WAY.

Update on Authorized Trainers for On-Track Safety Policy

Those contractors that are covered by Roadway Worker (C.F.R. 214) are required to have Roadway Worker Training.

Definition

Roadway worker means any employee of a railroad, or of a contractor to a railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway, signal and communication systems, electric traction systems, roadway facilities or roadway maintenance machinery on or near the track or with the potential of fouling a track, and flagmen and watchmen/lookouts as defined in this section.

* * *

Contractors working for CSXT or on a CSXT project hereby acknowledge that employees and

sub-contractors are defined as Roadway Workers as specified by the following definition (excerpt from Regulation):

Roadway Worker means any employee of a Railroad, or of a **CONTRACTOR** to a Railroad, whose duties include inspection, construction, maintenance or repair of railroad track, bridges, roadway signal and communication systems, electrical traction systems, roadway facilities or roadway maintenance machinery on or near track or with the potential of fouling a track.

As required by the Regulation, the Contractor certifies that all of his personnel (and Sub-Contractors) working under this contract have received On-Track Contractor Roadway Worker Safety training through an approved course. The program must comply with the FRA Regulation, and the content of the course must be approved by the CSXT Safety Program Administrator.

The one exception to this Policy Statement would be where the Contractor's activity puts their employees in an **"ABSOLUTE NO-FOUL"** situation or activity. For purposes of this policy, the definition of an ABSOLUTE NO-FOUL zone is where the Contractor employees or equipment will never be nor have the potential of being closer than 25 feet from any live operating track.

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117 (3)

No. 08-649

Supreme Court, U.S.
FILED
JAN 16 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CHARLES E. BAKER,

Petitioner,

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether a compelling reason exists to justify certiorari where the Petition fails to identify any conflict among the circuits or with a decision of a state court of last resort and where the circuit court's holding that Baker did not "foul" the tracks, as defined in 49 C.F.R. §214.7, was supported by ample evidence that his work on Illinois Central's right-of-way did not require any worker to be within twenty-five (25) feet of the tracks.

II. Whether a compelling reason exists to grant certiorari to review the jury's factual finding that Baker's work did not require him to "foul" the tracks within the meaning of the Federal Railroad Administration ("FRA") Roadway Worker Protection Regulations, 49 C.F.R. §214.303.

III. Whether a circuit court's interpretation of federal safety regulations adversely to an injured worker, without more, is sufficient to compel certiorari.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Illinois Central Railroad Company is a wholly-owned subsidiary of Illinois Central Corporation. Illinois Central Corporation is a wholly-owned indirect subsidiary of Canadian National Railway Company, which is a publically-owned company traded on the New York and Toronto Stock Exchanges. No single entity owns as much as 10% of the stock of Canadian National.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure Statement Pursuant to Supreme Court Rule 29.6	ii
Table of Contents	iii
Table of Authorities	iv
Introduction	1
Statement of the Case	2
Reasons for Denying the Petition	6
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES

Baker v. Canadian Nat'l/Ill. Cent. R.R., 536 F.3d 357 (5th Cir. 2008) 4, 5, 10, 13, 14

NLRB v. Hendricks Co. Rural Elec. Corp., 454 U.S. 170 (1981) 12

Rogers v. United States, 522 U.S. 252 (1998) 7

Rudolph v. United States, 370 U.S. 269 (1962) 12

South Dakota v. Kansas City S. Indus., Inc., 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990) 14

STATUTES

Miss. Code Ann. §63-3-1009 9

Miss. Code Ann. §77-9-225 9

Miss. Code Ann. §77-9-247 9

REGULATIONS

49 C.F.R. §214.7 ..... 1, 4, 10, 13

49 C.F.R. §214.303 6

OTHER AUTHORITIES

Federal Railroad Administration, *Railroad Workplace Safety: Adjacent-Track On-Track Safety for Roadway Workers, Notice of Proposed Rulemaking*, 73 Fed. Reg. 41214 (Jul. 17, 2008) 8

TABLE OF AUTHORITIES – Continued

Page

Sup. Ct. R. 10 ..... 12, 14

Sup. Ct. R. 10(a) 7

Sup. Ct. R. 10(c) 9

61 Fed. Reg. 65959, 65961 (Dec. 16, 1996) 11

INTRODUCTION

Baker has shown no conflicting jurisprudence and no important question of federal law compelling immediate review by this Court of the Fifth Circuit Court of Appeals' fact-specific decision that Baker, while driving across a public railroad grade crossing in the same manner as any other motorist, was not a "roadway worker," as defined in the Roadway Worker Protection Regulations ("RWPR"). 49 C.F.R. §214.7. Even if this Court were to reverse the Fifth Circuit's holding that Baker was not a roadway worker while on the worksite, Baker is still left with the jury's determination that he lost that status once he was traveling on Green's Crossing Road just like any other motorist.

While working on Illinois Central's right-of-way, neither Baker nor his co-workers came within twenty-five feet of the tracks. Consequently, Baker had no potential to "foul the tracks" and he did not meet the definition of "roadway worker." If Baker was not a "roadway worker" while on Illinois Central's right-of-way, he could not become one simply by exiting the worksite onto a public highway. Once Baker left the worksite, he was in the same position and subject to the same laws as any other motorist. Baker's claim to the contrary stretches the RWPR well beyond the language or intent of the regulations.

The Fifth Circuit's decision is not only consistent with the RWPR, it is an application of those regulations to a unique set of facts. While Baker claims

review is necessary to improve worker safety, he has failed to support this argument with any evidence that the Fifth Circuit's decision will adversely impact worker safety. For these reasons, the Petition should be denied.

STATEMENT OF THE CASE

This case arises from a rather routine railroad grade crossing accident in which the jury resolved all relevant fact issues in favor of Illinois Central. The pertinent facts show not only that this case is singularly inappropriate for certiorari, but also that the jury and Fifth Circuit Court of Appeals reached the correct conclusions and properly followed the law.

On the day of the accident, Baker was working as an employee of Hancock Construction, a contractor hired by Illinois Central to remove dirt from an area of land on Illinois Central's right-of-way. Tr. 473-75. The worksite consisted of a roughly rectangular area paralleling the railroad tracks. Adjacent to the north end of the worksite ran a public thoroughfare known as Green's Crossing Road. At the intersection of Green's Crossing Road and Illinois Central's tracks was a public grade crossing. The undisputed evidence showed that neither Baker nor any other worker came within twenty-five feet of the near rail of the railroad tracks while on Illinois Central's right-of-way. Tr. 475-77, 490-92.

The railroad crossing had a visibility to the south of at least 2,000 feet and was equipped with standard stop signs and crossbuck signs. Tr. 210-20, 478-86, 503-505, 537-38, 572-73. The turnout from the worksite onto Green's Crossing Road was slightly less than 86 feet from the railroad tracks, Tr. 569, and Baker's truck was approximately 50 feet long, Tr. 254. Baker's co-worker Kenneth Henderson, who drove a truck with the same dimensions as Baker's truck, testified that he was able to pull his truck off the worksite, onto Green's Crossing Road, and straighten the cab of his truck at the stop sign such that he could see down the tracks like any other eastbound motorist. Tr. 512-15, 525. Three eye-witnesses testified that, in fact, Baker's truck was straight and perpendicular to the tracks before Baker ran the stop sign and drove in front of the approaching train. Tr. 219-20, 482-85, 490-92, 551. According to these witnesses, Baker approached the crossing just as any other motorist and had the same opportunity to observe the crossing and approaching trains. *Id.* Unfortunately, and undisputed in the record, Baker ran the stop sign without stopping, looking or listening for approaching trains, while the train was sounding its horn and plainly visible. Tr. 210, 215, 220. Based upon these facts, the jury correctly found that Baker's own negligence was the sole cause of the collision.

Under the RWPR, a railroad is required to provide "on-track safety" to "roadway workers." To be a road worker, the employee must, among other things, be "on or near track or with the potential of

following a track." 49 C.F.R. §214.7. "Following a track" is defined as:

> The placement of an individual or an item of equipment in such proximity to a track where the individual equipment could be struck by a moving train or on-track equipment, or in any case is within four feet of the field site of the near running rail. *Id.*

The trial court's instruction to the jury on the plaintiff's RWPR claim specifically quoted the definition of "following the track" stated in 49 C.F.R. §214.7. Tr. 655. The trial court further instructed the jury that the RWPR did not apply once Baker had "left the worksite and was traveling on a public highway and approaching a public railroad crossing, with the same opportunity as other motorists to see and comprehend the crossing." Tr. 654-57. On a special verdict form, the jury answered both "No" to the question of whether Baker's work required him to "foul the track" as explained in the court's instructions.

On appeal, the circuit court took a slightly different approach but reached the same conclusion. *Baker v. Canadian Nat'l/Ill. Cent. R.R.*, 536 F.3d 357 (5th Cir. 2008). After noting that the jury specifically found that Baker's work did not require him to "foul the tracks," *Baker*, 536 F.3d at 362, the circuit court held that because Baker's work on Illinois Central's right-of-way did not place him any nearer than "twenty to thirty feet from the closest rail," "Baker did not, as a matter of law, have the potential to follow the track, nor was he on or near the track." *Id.*,

at 365. Therefore, Baker was never a "roadway worker" and the protections specified in the RWPR were not required. *Id.*

Baker's statement of the case contains several factual inaccuracies that should be noted. Like the Fifth Circuit, Baker states that the "work site was twenty to thirty feet from the closest rail." In fact, the evidence showed that no worker came less than twenty-five feet from the nearest rail. Tr. 475-77, 490-92. Baker states that the last wheels of his trailer "were still on or had barely cleared the work site." In fact, the train engineer testified that Baker's truck was "squared up with the railroad tracks" and "all in his lane." Tr. 551. Three of Baker's co-workers who witnessed the accident testified that Baker's truck was straight when it reached the stop sign and that Baker had the same view as any other eastbound motorist. Tr. 219-20, 482-85, 490-92, 551. The Petition also states that "not all the sight obstructions had been removed." However, ample evidence was introduced to show that Baker had an unobstructed view to the south of over 2,000 feet. Tr. 478-86. Finally, Baker states as fact that Illinois Central was acquired by "Canadian National" on July 1, 1999, and that "Canadian National requires railroad worker protections whenever work would occur within 25 feet of the rail." In fact, Canadian National Railway has never been a party to this lawsuit and the trial court properly excluded evidence of Canadian National's

policies.[1] Supp. Tr. 381-82. In compliance with 49 C.F.R. §214.303, Illinois Central had its own "On Track Safety Rules," which meet the requirements of the RWPR. Tr. 566, 577-78. Illinois Central's risk mitigation officer, H.J. Freeman, Jr., testified that under Illinois Central's policy, a flagman was not required because Baker did not work within four feet of the tracks and did not have the potential to foul the tracks. *Id.*

The eye-witnesses agreed Baker was looking back over his shoulder at his co-workers when he ran the stop sign and never looked for approaching trains, while the train was plainly visible, sounding its horn, and travelling within the FRA speed limit. Tr. 210, 215, 220, 484-87, 536-38, 545, 547, 549, 553.

REASONS FOR DENYING THE PETITION

For several rather obvious reasons the Court should deny Baker's Petition.

[1] Baker's complaint referred to the defendant as "Canadian National/Illinois Central Railroad," a name by which Illinois Central previously did business. Prior to trial, this moniker was corrected and the case went to trial solely against Illinois Central. Illinois Central and Canadian National Railway are separate corporations. Supp. Tr. 381-82.

A. No Conflicting Jurisprudence.

Baker has not identified any conflicting decision of this Court, the circuit courts of appeals, or any state appellate court of last resort. To the best of Illinois Central's knowledge, the decisions of the Circuit Court and District Court below are the only published decisions to address whether merely traversing a public railroad grade crossing constitutes "fouling the tracks" under the RWPR. By its nature, lower court decisions are limited to the specific facts of this case. Consequently, whether other courts will agree or disagree with the Circuit Court's decision, or whether similar cases will even be litigated, is entirely speculative. Certiorari should be denied unless and until a significant conflict in the decisional law arises. Sup. Ct. R. 10(a); *see Rogers v. United States*, 522 U.S. 252 (1998) (writ of certiorari dismissed where conflict among courts did not exist).

B. Absence of a Sufficiently Important Question of Federal Law.

With no obvious justification for certiorari, Baker argues that the Fifth Circuit decision has "significantly increased the possibility that other persons doing construction or maintenance work for railroads or their contractors will be injured or killed." Cert. Pet., at 9-10. Citing statistics on fatalities and injuries among roadway workers since the adoption of the RWPR in 1997, *id.*, at 10-12, Baker argues that certiorari should be granted in order to reduce the

risk of injury which, Baker contends, was created by the Fifth Circuit decision.

Baker's "worker safety" argument is entirely speculative and insufficient to justify certiorari. Nowhere has Baker submitted any evidence that the Fifth Circuit decision will reduce the effectiveness of the RWPR. The statistics cited by Baker are not categorized by incident type, equipment involved, or any other distinguishing factor. Consequently, the Petition fails to show a factual nexus between the statistics cited and the instant case. Moreover, the most recent publication cited by Baker – *Railroad Workplace Safety: Adjacent-Track On-Track Safety for Roadway Workers, Notice of Proposed Rulemaking,* 73 Fed. Reg. 41214 (Jul. 17, 2008), was published only one day after the Fifth Circuit entered judgment for Illinois Central in this case. Thus, these statistics cannot possibly show an impact of the Fifth Circuit's decision on roadway worker safety.

Without doubt, the RWPR was adopted by the FRA for the laudable purpose of reducing the risk of injury and death to railroad roadway workers. Merely because the regulations concern worker safety, however, does not mean that a decision denying a plaintiff relief under those regulations is sufficiently important to justify certiorari. If this were so, then any time a circuit court of appeals interpreted federal safety regulations in favor of a defendant, then certiorari would be appropriate.

Baker further argues that the FRA has recognized that the RWPR "need to be strengthened, not weakened, in order to 'reduce further the risk of serious injury or death to roadway workers.'" Cert. Pet., at 11. The problem with this argument is that, on its face, it recognizes that the decision of whether to further strengthen these regulations is currently before the FRA. If Baker is correct and the RWPR do need strengthening, then the FRA is well-suited to make this decision. Moreover, this argument presumes Baker was a "roadway worker" – a fact resolved adversely to Baker by the jury.

More pertinent to this case, the jury expressly found as a matter of fact that Baker was not due the protections provided under the RWPR and was provided all the protections due under state statutory and common law. These protections included required railroad crossbuck signs, Miss. Code Ann. §77-9-247; stop signs, Miss. Code Ann. §63-3-1009; the locomotive horn and bell sounded for over 900 feet, Miss. Code Ann. §77-9-225; and an unrestricted view of over 2,000 feet. Baker's argument that certiorari is required to protect worker safety is ironic given that the jury found his own unsafe conduct to be the sole cause of the accident.

Neither the statistics cited by Baker nor the facts of this case reveal a sufficiently important question of federal law to justify certiorari. Sup. Ct. R. 10(c).

C. Propriety of the Decision Below.

The Fifth Circuit's decision was proper and consistent with the RWPR. The Court properly recognized that "fouling the tracks . . . means the placement of an individual . . . in such proximity to a track that the individual . . . could be struck by a moving train or on-track equipment, or in any case within four feet of the field side of the near running rail." 49 C.F.R. §214.7. The Court properly recognized that there was no evidence that Baker's work required him to be less than "twenty to thirty" feet from the tracks. In fact, the undisputed evidence showed that at no time was any worker less than twenty-five feet from the nearest rail of the track. Tr. 447. Baker introduced no evidence that he was struck, or in danger of being struck, by a train while on Illinois Central's right-of-way. Rather, he was struck while driving on a public street with the same opportunity to see and hear the approaching train as any other motorist. Consequently, Baker was not a "roadway worker" while on Illinois Central's right-of-way. The Fifth Circuit did not reach the issue of whether he became a roadway worker by driving on to the public road but noted that the jury found against Baker on this issue. *Baker*, 536 F.3d at 363.

The Advisory Committee's comments establish that the RWPR was promulgated for limited purposes and based on specific accident data:

> The Advisory Committee purposely chose not to address all conceivable hazards, but studied available data regarding safety issues

> and selected those circumstances presenting the greatest risk to roadway workers.

61 Fed. Reg. 65959, 65961 (Dec. 16, 1996). The comments make clear that "FRA believes that adequate voluntary measures are being taken to protect roadway workers at highway-rail crossings." "The accident data studied does not provide information regarding this type of hazard." *Id.* If the FRA intended the RWPR to apply to the ordinary use of public grade crossings by railroad employees, it would have said so in the regulations or comments.

Under Baker's interpretation of the RWPR, a railroad worker would be entitled to on-track safety whenever his duties require him or her to traverse a railroad grade crossing in the performance of his or her duties. The fallacy of this argument is illustrated by the facts of this case. When Baker left the worksite, he had the option to turn right toward the railroad crossing or left away from the railroad crossing. Had he chosen to turn left, he had the option of driving to the next railroad crossing or elsewhere to cross the railroad tracks. Under Baker's interpretation, he would be entitled to flag protection anywhere he chose to traverse a public railroad crossing regardless of the type of warning devices at the crossing. But the RWPR was not intended to address "all conceivable hazards" and the FRA chose not to address "roadway workers at highway-rail crossings." *Id.*

Baker argues that because the RWPR defines "adjacent tracks" as "two or more tracks with track

centers spaced less than twenty-five feet apart," then the phrase "on or near track" in the definition of "fouling the track" must mean anything less than twenty-five feet. This argument is unavailing for three reasons. First, it cannot be found in the language of the regulations. Second, neither Baker nor his co-workers ever came within twenty-five feet of the nearest rail while on Illinois Central's property. Third, Baker was not working between two or more tracks. Consequently, the Fifth Circuit correctly determined that as a matter of law Baker was not a roadway worker.

D. Certiorari Is Inappropriate to Address Asserted Factual Errors or the Misapplication of Law to Fact.

In reality, Baker is unhappy with the jury's factual finding that his work did not require him to "foul the track" and the Fifth Circuit's application of the RWPR to the evidence introduced at trial. However, a petition for certiorari "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10; *NLRB v. Hendricks Co. Rural Elec. Corp.*, 454 U.S. 170 (1981); *Rudolph v. United States*, 370 U.S. 269 (1962).

Quoting the regulations verbatim, the trial court instructed the jury –

> "Fouling a track" is defined as "the placement of an individual or an item of equipment in such proximity to a track that the individual or equipment could be struck by a moving train or on-track equipment, or in any case within four feet of the field side of the near running rail."

The trial court further instructed the jury that –

> When a roadway worker such as the plaintiff has left the work site and is traveling on a public highway and approaching a public railroad crossing, with the same opportunity as other motorists to see and comprehend a crossing, he is at that point treated as any other member of the motoring public and is no longer in need of the special protections afforded to him in his capacity as a roadway worker.

Tr. 654-57. The jury then found, based on the evidence, that Baker's work did not cause him to "foul the track" within the meaning of the RWPR. *Baker*, 536 F.3d at 363.

Baker now attempts to convert the jury's factual finding – which was not addressed by the Fifth Circuit – into the legal issue of what is meant by the word "near" in 49 C.F.R. §214.7. Unfortunately for Baker, the jury has spoken to this issue and found that the worksite was such that Baker could turn onto the Green's Crossing Road and approach the

railroad crossing just as any other motorist. *Id.* The Fifth Circuit found that while on Illinois Central's right-of-way, as a matter of law, Baker was not close enough to the tracks to be considered "on or near a track or with the potential of fouling a track." *Id.* Even if this Court were to reverse the Fifth Circuit's holding that Baker was not a roadway worker while on the worksite, Baker is still left with the jury's determination that he lost that status once he was traveling on Green's Crossing Road just like any other motorist. *See South Dakota v. Kansas City S. Indus., Inc.*, 880 F.2d 40 (8th Cir. 1988), *cert. denied*, 493 U.S. 1023 (1990) (certiorari denied where Court able to decide case on another ground). Whether another court or jury could disagree with these findings does not alter the fact that the error asserted by Baker is one "of [either] erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Consequently, this case is not suited for certiorari.

CONCLUSION

The RWPR were not created to address every conceivable hazard to railroad roadway workers and the FRA expressly chose not to address the risks roadway workers face at public grade crossings. Baker has failed to show any conflicting decision of a federal or state court and has failed to show why the issue presented is sufficiently important to justify certiorari. Contrary to Baker's assertion, the Fifth

Circuit's decision does not severely reduce the protections offered by the RWPR. Rather, the Fifth Circuit has simply applied those regulations to a unique set of facts in this particular case. According to every eyewitness, and as determined by the jury, Baker was struck by a train solely because he ran the crossbuck and stop signs, failed to yield the right-of-way, and failed to look or listen for the approaching train. Accordingly, the petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 08-649

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Supreme Court of the United States

CHARLES E. BAKER,

Petitioner,

v.

CANADIAN NATIONAL/ILLINOIS CENTRAL RAILROAD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY TO RESPONDENT'S INTRODUCTION 1

REPLY TO RESPONDENT'S STATEMENT OF THE CASE 2

REPLY TO RESPONDENT'S ARGUMENT 5

A. Certiorari is Not Limited to Conflicting Jurisprudence 5

B. The Fifth Circuit's Limitation of the RWPR Creates an Important Question of Federal Law 5

C. The Fifth Circuit's Decision Renders Significant Portions of the RWPR Superfluous 8

D. The Petition Seeks Correction of Two Erroneous Legal Holdings 11

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 3

Baltimore & Carolina Line, Inc., v. Redman, 295 U.S. 654 (1935) 1, 7

Rogers v. United States, 522 U.S. 252 (1998) 5

RULES

Sup. Ct. R. 10(c) 5

REGULATIONS

49 C.F.R. § 214 ..... 1, 8, 9

49 C.F.R. § 214.301(a) 6, 9

49 C.F.R. § 214.7 ..... *passim*

OTHER AUTHORITIES

61 Fed. Reg. 65959 9

http://www.ilsos.gov/corporatellc/CorporateLlc Controller [last visited January 25, 2009] 4

REPLY TO RESPONDENT'S INTRODUCTION

The Petition asks this Court to resolve two important questions of federal law that became unsettled when the Fifth Circuit made legal findings that are contrary to the plain language of the Roadway Worker Protection Rules (RWPR), 49 C.F.R. § 214. *See* Pet'r Br. at i. The Fifth Circuit's decision was not "fact-specific." The Fifth Circuit held as a matter of law that Baker's work did not require him to "foul" the track because the worksite was no closer than twenty feet from the track, and "Baker fouled the tracks and was hit away from the work site." App. 8. The Fifth Circuit held the RWPR do not apply to workers who are engaged in construction or maintenance of the roadway if they are struck by trains away from a "worksite" that is "on or near track." *Id.* These holdings are contradicted by the RWPR, which state that a "roadway worker" includes a worker whose ordinary duties are not "on or near track," if the worker's activities have "the potential of fouling a track." 49 C.F.R. § 214.7.

The district court held that Plaintiff ***was*** a "roadway worker." The jury's finding that Baker somehow "lost" this status was based on instructions containing limitations on the RWPR that were specifically rejected by the Federal Railroad Administration (FRA). Pet'r Br. at 14-15. The Fifth Circuit did not address this issue. App. 8, 11. Notably, the interpretation of law is ordinarily a judicial function; juries are limited to findings of fact. *See Baltimore & Carolina Line, Inc. v. Redman*, 295 U.S. 654, 657

(1935). The jury never reached the issue of whether the crew's work was "near track." App. 80-85. The jury never apportioned fault between Baker and Respondent.[1] *Id.*

These decisions undermine FRA regulations issued pursuant to congressional mandate after a formal notice-and-comment procedure. Pet'r Br. at 10. The RWPR were intended to protect workers such as Baker. *Id.* These decisions were issued even as the FRA seeks to strengthen roadway worker protections. *Id.* at 9-12. The FRA cannot protect roadway workers if the federal courts refuse to apply the plain language of its regulations. For these reasons, the Petition should be granted.

REPLY TO RESPONDENT'S STATEMENT OF THE CASE

There are no factual disputes for this Court to resolve. Respondent does not dispute that Baker was an employee of a contractor whose vehicle was struck by a train while he was engaged in construction or maintenance of the roadway. Tr. 90-93, 107-09. Respondent does not dispute that Canadian National and several other Class I railroads require roadway worker protection whenever the work is within twenty-five feet of the near rail of the track. *See* Pet'r

[1] Baker will refer to Respondent as "Respondent," in light of the dispute as to Respondent's relation to Canadian National.

Br. at 5-6. Respondent does not dispute that Illinois Central rules state that movement over crossings can only occur where protection is provided by a watchman, or where the employee in charge has received foul time or track and time from the control operator. Doc. 69, Ex. 12 at 8-10. Respondent does not dispute that it did not provide these or any of the other protections required by the RWPR to Baker or his crew. Tr. 201, 545.

The Fifth Circuit acknowledged testimony by Leon Davis that the work site was as close as twenty feet from the near rail, but held as a matter of law such work would not be "near track." App. 8, Tr. 185. Respondent's citation of contrary evidence is irrelevant because the Fifth Circuit ruled as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

The jury did not make any specific finding that Baker's negligence was the sole cause of his collision. App. 80-85. The jury's finding that Baker was not **required** to foul the track is irrelevant, as the RWPR apply whenever the work has the **potential** to foul the track. 49 C.F.R. § 214.7. Furthermore, the jury made this finding based on instructions given over Baker's objection stating the RWPR would not apply if Baker "had the same opportunity as other motorists to see and comprehend the crossing." Tr. 641, 654-57. Baker noted this jury finding went against undisputed evidence that Baker and the other drivers were required as part of their work to haul the debris across the crossing to the nearby landfill. *See* Tr. 92-94, 192,

489-92, 518, App. 15-16. The Fifth Circuit affirmed this finding, but did not identify where this issue was disputed. App. 15-16. Respondent does not cite any evidence that Baker was not required to use the crossing as part of his work.

Respondent suggests it ***previously*** did business as Canadian National/Illinois Central Railroad, but that Canadian National's rules have no application to it. However, Illinois Central has published documents indicating that on July 1, 1999, "CN takes control of Illinois Central Corporation." Doc. 140, Ex. 1, p. 2. A search on the Illinois Secretary of State's website for "Illinois Central Railroad Company," reveals Respondent ***still*** does business under that name. *See* http://www.ilsos.gov/corporatellc/CorporateLlcController [last visited January 25, 2009]. Respondent suggests trial proceeded only against Illinois Central. However, Respondent does not cite to the record for this statement, and the trial transcript shows otherwise. Tr. 1.

The remaining facts Respondent cites appear irrelevant to the questions Baker has presented. However, Baker notes he disputed Respondent's evidence regarding his ability to see and hear the oncoming train and otherwise approach the crossing like an ordinary motorist. Tr. 98, 101-02, 104, 107, 185-90, 198, 203-04, 207, 242-44, 254, 259-61, 268-70, 297-300, 352, 357-58, 608-14. Baker also noted that Respondent's claims that he did not stop at the stop sign or look to see if a train was coming were contrary to how he approached railroad crossings throughout his career as a truck-driver hauling hazardous materials.

Tr. 87-88. Respondent's own photographs showed Baker's trailer had not been straightened and was still occupying both lanes of traffic even after the collision, contradicting the testimony Respondent cites. Def. Tr. Ex. 8. Baker presented ample evidence that Respondent's failure to provide RWPR protections was a cause of the collision. Tr. 98-99, 108, 285-87, 387-422.

REPLY TO RESPONDENT'S ARGUMENT

A. Certiorari is Not Limited to Conflicting Jurisprudence

Respondent's suggestion that certiorari cannot be granted until there is a conflict between two appellate courts is contradicted by this Court's own rules, which state certiorari can be granted where "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). *Rogers v. United States*, 522 U.S. 252 (1998), the case it cites, dismissed a petition not because of a lack of circuit conflict, but because the question raised was not fairly presented by the record. *Id.* at 253.

B. The Fifth Circuit's Limitation of the RWPR Creates an Important Question of Federal Law

Respondent's suggestion that certiorari cannot be granted until there is definitive proof the Fifth Circuit's

decision has undermined roadway worker protection and thereby led to injuries or fatalities is without merit. The RWPR became effective January 15, 1997 as a result of a formal notice-and-comment procedure that commenced in 1992 pursuant to a congressional mandate. App. 102-04. The purpose of these rules was to prevent persons performing railroad work from being injured or killed by trains or other equipment. 49 C.F.R. § 214.301(a). Obviously, preventing foreseeable injuries is preferable to waiting to see how many injuries and fatalities result. As a practical matter, there is no mechanism within this Court's rules by which Petitioner can reassert the Petition after there have been casualties. The Fifth Circuit's decision to ignore the plain language of the RWPR replaces the formal notice-and-comment procedure with judicial fiat.

Contrary to Respondent's suggestion, Petitioner is not suggesting that certiorari is appropriate every time a circuit court of appeals interprets federal safety regulations in favor of a defendant. Certiorari is appropriate here because the Fifth Circuit, rather than merely interpreting ambiguous regulations, elected to nullify key components of the RWPR. Respondent does not dispute that Baker was performing construction and maintenance activities when his truck was struck by the train. The RWPR state they protect workers when such duties take place "on or near track or with the potential of fouling a track." 49 C.F.R. § 214.7. The Fifth Circuit nullified the "potential of fouling a track" language by holding the RWPR

only protect workers who foul the track while on the work site. App. 8. Under that analysis, the RWPR could only apply where the employee's ordinary duties are performed "on or near track," rendering the phrase "potential of fouling a track" superfluous.

Respondent's suggestion that the FRA has the authority to strengthen RWPR protections is proven false by the Fifth Circuit's decision. Regulations cannot be effective if courts refuse to enforce them according to their plain language. Notably, it took the FRA more than four years to develop the RWPR. App. 102-04. The results of that careful, deliberative process were severely undermined by the Fifth Circuit's decision to ignore key components of the regulations.

Respondent suggests the jury decided Baker ***was not*** a "roadway worker." In fact, the district court determined Baker ***was*** a "roadway worker." Tr. 654-57. The jury held that Baker was not entitled to RWPR protections based on jury instructions imposing limitations not contained in the RWPR. *Id.*, App. 80. Obviously, it was error to allow a jury to determine a legal question. *See Redman*, cited *supra* at 1. Moreover, the RWPR apply if the worker's duties have "the **potential** of fouling a track." 49 C.F.R. § 214.7. Even if the jury's finding that Baker's work did not **require** him to foul the track had any evidentiary support, which it clearly did not, it would not be relevant to the issue of whether his duties had the **potential** to foul the track.

Respondent's suggestion that the jury found Baker's conduct to be the sole cause of the accident is not supported by the record, because the jury never reached the issue of apportionment of fault. App. 83-84. If the RWPR had been correctly interpreted, the jury would have been instructed that Respondent violated federal regulations designed to prevent the collision. Under those circumstances, the jury would have apportioned fault under proper instructions. App. 83-84.

C. The Fifth Circuit's Decision Renders Significant Portions of the RWPR Superfluous

The Fifth Circuit acknowledged Baker ***was*** fouling the track when he was hit by a train. App. 8. It held this fact was "not dispositive" because he was hit away from the worksite. *Id.* The RWPR do not contain a worksite limitation – in fact, they state the protections apply whenever a worker's activities take place "on or near track or with the potential of fouling a track." 49 C.F.R. § 214.7. It was undisputed Baker was engaged in construction and maintenance activities when he was struck by the train. While there was a significant dispute at trial as to whether Baker could approach the crossing like an ordinary motorist, that dispute is not relevant to the RWPR. The FRA did not insert any language in the RWPR suggesting their protections do not apply if a worker's risks are deemed comparable to that of a non-worker. 49 C.F.R. § 214. The FRA's decision not to do so is easily understandable – such a provision would eliminate any

ability to predict when the regulations are or are not in place, leaving workers unprotected and railroads guessing as to when they can and cannot be held liable. The Fifth Circuit did not address whether Baker ceased to be a "roadway worker" by driving his truck onto the public road in order to dump the removed debris. App. 8.

Respondent takes FRA comments completely out of context. Respondent quotes FRA comments stating "FRA believes that adequate voluntary measures are being taken to protect roadway workers at highway-rail crossings," and "The accident data studied does not provide information regarding this type of hazard." However, these sentences are lifted from a paragraph explaining that the rule is not intended to protect roadway workers from being hit by **vehicular traffic** at crossings. *See* 61 Fed. Reg. 65959, 65961 ("Neither FRA nor the Advisory Committee discussed or intended to address the hazards that vehicular traffic at grade crossings pose for roadway workers."). Baker was not hit by **vehicular traffic** – he was hit by a **train**. The FRA clearly believed railroads were not taking adequate voluntary measures to protect roadway workers from being struck by **trains**. 49 C.F.R. § 214.301(a). It therefore required railroads to provide protections to any persons performing construction or maintenance work, if that work could cause them to be hit by trains. 49 C.F.R. § 214. There is no grade crossing exception within the RWPR. *Id.*

Respondent complains that Baker's interpretation of the RWPR would require railroads to provide

on-track safety whenever their workers' duties require them to traverse a public grade crossing. As an initial matter, this is not merely Baker's interpretation, it is what the plain language of the RWPR require. Under the RWPR, railroads have two options: (1) design the work so that no worker can be hit by a train; or (2) provide any of the protections required by the RWPR, such as a watchman or flagman. This is not a particularly onerous burden. The undisputed testimony from Baker's liability expert was that every Class I railroad he contracted for provided such protections from 1965 through 1987. Tr. 388-92, 404-12, 420-28. Respondent suggests there was some way to dump the material that did not involve use of the crossing, but it does not cite any portion of the record for its argument. Moreover, it was undisputed that Baker and the other drivers were instructed to haul the debris across the crossing to the nearby landfill. Tr. 92-94, 192, 489-92, 518. This is not a situation where the worker unexpectedly chose to use a grade crossing.

Respondent's argument as to the meaning of the term "near" is unavailing. Baker's argument is not that he was working between adjacent tracks. Baker's argument is that while the RWPR do not define "near," they do define "adjacent" as being within twenty-five feet. 49 C.F.R. § 214.7. "Adjacent" in its ordinary usage is defined as "nearby." Pet'r Br. at 16-17. Contrary to Respondent's suggestion, there was testimony that the work took place within twenty feet of the tracks. Tr. 185. Respondent's claim agent

testified that "this work line here that they do not work on was approximately 25 feet." Tr. 584. The Fifth Circuit cited no basis for its holding that "near" means more than four feet but does not extend to a distance of twenty feet. App. 8. Notably, several other Class I railroads use twenty-five feet as their limit. Pet'r Br. at 5-6. Because the Fifth Circuit's holding rested on its finding as a matter of law that twenty to twenty-five feet would not be "near" track, its decision must be reversed.

D. The Petition Seeks Correction of Two Erroneous Legal Holdings

The Fifth Circuit did not properly state the rule of law. The Fifth Circuit held the RWPR do not apply to a worker's construction and maintenance activities that put him in position to be hit by a train, even though the RWPR clearly state they are applicable in such an instance. App. 7-8. The Fifth Circuit held that work taking place within twenty-five feet of the track was, as a matter of law, not "near" track without citing any basis for its conclusion, when the RWPR define the synonym "adjacent" to be anything within twenty-five feet of the tracks, and several other Class I railroads treat any work within twenty-five feet of the tracks as requiring roadway worker protection. These are erroneous legal interpretations that are clearly the proper subject of certiorari.

The district court's instructions that a "roadway worker" can lose that status if he can "see and comprehend" a crossing like an ordinary motorist has no support in the regulations, and was not endorsed by the Fifth Circuit. App. 8. The jury's finding that Baker's work did not **require** him to "foul" the track is irrelevant to the issue of whether that work had the **potential** to "foul" the track. Furthermore, the jury made this finding even though the undisputed evidence showed Baker was required by a supervisor to drive across the tracks to dump the removed debris. The issue should never have been submitted to the jury. As shown *supra*, the jury should not have been given the authority to render interpretations of law. Finally, the jury never addressed the issue of whether the work was taking place "near" track. App. 80-85.

CONCLUSION

The RWPR require railroads to provide protection to workers whose potential activities can cause them to be hit by trains. The RWPR do not contain exceptions based on the location of the worksite, the use of public crossings, or the nature of the risks the workers encounter in comparison to non-workers. The Fifth Circuit and the district court's decision to create these exceptions reduce the scope of the protections required by the plain language of the RWPR, jeopardizing the safety of roadway workers. Respondent's arguments as to the cause of the accident are factual

matters that should be addressed at a new trial in which the jury is properly instructed, and in which the jury is not asked to resolve issues that are either clearly legal in nature or in which the evidence is not disputed. Because the RWPR are necessary to prevent fatalities and severe injuries, the Petition for certiorari should be granted to restore its protections.

Respectfully submitted,

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